

From Internal Market Regulation to European Labour Law

by

Jari Hellsten
Master of Law

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Contents

Preface and Acknowledgements

II

First Article:

On Social and Economic Factors in the Developing European Labour Law; Reasoning on Collective Redundancies, Transfer of Undertakings and Converse Pyramids

III + 67

Second Article:

On the Social Dimension in Posting of Workers;
Reasoning on Posted Workers Directive, Wage Liability,
Minimum Wages and Right to Industrial Action

VII + 139

Third Article:

On the Social Dimension in the Context of EC Competition Law;
Reasoning on *Albany*, Article 86(2) EC, and the Finnish
Earnings-Related Pension Scheme TEL under Article 86(2)

VII + 90

Fourth (Synthesis) Article:

From Internal Market Regulation to *ordre communautaire social*;
Reasoning on European Labour Law

II + 121

“Labour is not a commodity.”

Preface and Acknowledgements

The author’s interest in EU law was originally generated by participation in European law-making in 1992-1998 as an officer of the European Federation of Building and Woodworkers. We worked for an acceptable Posted Workers Directive that would cover cross-border posting of workers in the framework of freedom to provide services. In that job, I realised how significant the role of the Court of Justice in law-making was. The famous obiter dictum in *Rush Portuguesa* (later followed by *Vander Elst*) on the Member States’ right to extend their laws and collective agreements to workers posted into their territory temporarily was our defence against a compulsory threshold period in applying the host state wages and other terms and conditions of employment to the posted workers. We acted against social dumping. The welfare and interests of construction workers’ had been close to my heart since the beginning of my professional career in 1975 in the Construction Workers’ Union (Finland). However, promoting their interests in Europe was radically different from my previous experience at the national level. This law-making required general understanding of the legal status and consequences of EU directives, and in particular of positioning of the Posted Workers Directive under the legal umbrella of free provision of services. Our struggle for a decent posting directive was of general importance, I dare to say, was successful and helped in producing the outcome in 1996.

After returning to Finland, a book, *Collective Agreement and Competition Law in the EU* (DJØF, Copenhagen 2001), edited and partially written jointly with Professor Niklas Bruun, enriched my vocation in legal scholarship. However, for numerous reasons I was not able to start a thorough research project concentrating on the relationship between internal market law and European labour law until 2004. Since the beginning in June 2004, I have worked under his tutorship in this project entitled ‘From Internal Market Regulation to European Labour Law’ which, when the second publication was nearing its maturation, led to the decision to submit the outcome of the whole study project as my doctoral thesis.

Conducting this study has been above all a learning process, and in the first article (publication) I realised that it is more useful to write more elaborately on selected items than one person trying to shape ‘everything of interest’. This ‘deep but not broad investigation’ then resulted in the first publication, especially in the conviction that the Transfer of Undertakings (Acquired Rights) Directive also applies to cross-border transfers, and so within groups of companies. Thus, it is very educative to see the fruits of one’s own life-long learning. In the same publication my reasoning on the theory of converse pyramids generated the ambition to come up later with a re-thought theoretical conceptualisation of European labour law and its positioning in the legal Union. The first three chapters of the second publication (on posting of workers) naturally have their roots in my European service. The fourth chapter was again a question of life-long learning. That attitude was necessary in writings on the right to collective action that penetrated the

study plan in the form of the *Laval* case and imposed the shape of the basics of a European right to collective action, *Laval* being later followed by the strike case *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking*. Writings on the right to strike again imposed 'spill-over' learning in the necessity to understand the basics of the effect of (general) international law in EU law. The third publication broadly followed the study plan, while there, too, the more concentrated approach led to a refined understanding of the interplay between the 'general economic interest' in the wording of Article 86(2) and the particular *social* tasks of general interest already covered by that provision in case-law.

The *Laval* and *Viking* strike cases later also pushed for an approach beyond the original study plan in the synthesis article. It became essentially more than a mere synthesis, seeking to lay the foundations of a new collective EU labour law paradigm. It hopefully pushes the necessary debate on the European Community labour law further.

* * *

Thanks and acknowledgements are appropriate at the end of this research project. First and foremost, without the institutional and intellectual support of Professor Niklas Bruun since preparing the project and resolving its various problems, this study would have been radically more difficult to carry out, if not impossible. I also warmly thank the five anonymous national referees who gave their recommendations on the original study plan. I also want to thank Professor Brian Bercusson cordially for acting not just as my opponent, but also as a preliminary examiner who made many valuable comments. His academic works have also given me much inspiration and support. Likewise, Professor Tuomas Ojanen has directed me, especially in the challenging and developing field of fundamental rights, not only as a preliminary examiner but also through his comments and encouragement throughout.

Financing the study is a result of the Finnish tripartism, meaning contributions by the tripartite and law-based Finnish Work Environment Fund (which is financed by the private sector employers), the Ministry of Labour, and a considerable number of trade union organisations. In guaranteeing the financing, Mrs. Kirsti Palanko-Laaka, former head of the work environment department of SAK, the Central Organisation of Finnish Trade Unions, had a prominent role. Pekka Hynönen (who once made me a lawyer), former chairman of the Construction Trade Union, was obviously the first to promise a trade union contribution for the project. Jorma Rusanen from SAK later found further trade union contributions. At the Ministry, Matti Salmenperä, its then leading labour law officer, saw the study's importance and Jouni Lemola later led the Ministry steering group. Ilkka Tahvanainen at the Work Environment Fund has always supported the project, even when delayed.

The trade union organisations contributing to the study financially are (in alphabetical order): AKAVA, the Confederation of Unions for Professional and Managerial Staff in Finland; the Central Organisation of Finnish Trade Unions, SAK; the Chemical Workers' Union; the Construction Trade Union; the Finnish Confederation of Salaried Employees,

STTK; the Finnish Metalworkers' Union; the Finnish Paper Workers' Union; the Finnish Public Services Unions' EU Working Party (FIPSU); the Finnish Seamen's Union; the Service Union United, PAM; the Transport Workers' Union, AKT; the Union of Professional Engineers in Finland, UIL; the Union of Salaried Employees, TU and the Wood and Allied Workers Union. I am grateful to all those responsible in their various unions.

On this occasion, I also recall with pleasure the many debates during my years in Brussels with Rosendo Gonzalez Dorrego, Paul Windey, Jean-Jacques Paris and Mikko Huttunen (including his more recent comments and encouragement) from the European Commission, who all stimulated my European law exercises. David Lanove, as an honourable employer representative, showed the value of genuine European social partnership. Ove Bengtsberg, Jan Cremers, William van der Straeten and Frank Leus have been true friends and colleagues in the European Federation of Building and Woodworkers. Some of the debates with these friends and colleagues reached even the effect of photogrammetry in explaining case-law.

On the national scene, Olavi Sulkunen (deceased 2005) encouraged dealing with the right to collective action in a European context through a European and international approach. In the third article (at TEL, the pension scheme) I was able to rely on professional feedback from Jukka Rantala, Mrs. Riitta Korpiluoma, Mrs. Kaija Kallinen, Pertti Parmanne and Matti Leppälä. Otherwise Petteri Ojanen, Markus Penttinen, Heikki Pohja, Kyösti Suokas, Simo Zitting, Markku Kiikeri, Heikki Lehtinen, Anders von Koskull, Juri Aaltonen and Professor Kauko Wikström have variously shared my (sometimes our joint) European problems over the years.

I also gratefully thank the Library of the Finnish Parliament, where Mrs. Hilikka Salasmaa at the Interlibrary Loans Service especially has been burdened with my requests.

There remains the private level of gratitude. Hence, I address the most cordial thanks to my cohabitee Hannele and to my children Sohvi-Maari, Eljas and Aarni. Love and understanding within the family have guaranteed the necessary peace to concentrate on the study. Last but not least, my mother has endured my considerable absence; my deceased father once understood the value of classical education: *haec habui, quae dixi*.

J.H. November 2007

The First Article
of the Doctoral Dissertation
‘From Internal Market Regulation to European Labour Law’

**On Social and Economic Factors in the Developing
European Labour Law**

**Reasoning on Collective Redundancies,
Transfer of Undertakings and
Converse Pyramids**

Jari Hellsten (ML)
Hanken School of Economics,
Helsinki, Finland

Content

Index	II
Foreword	III
Abstract	IV
Chapter I	
1. On the Development of the Social Dimension in the EU	1
1.1 Its Origin in the EEC Treaty	1
1.2 Summing up the Founding History of the EEC	7
2. New Wave of 1970's	7
2.1. The Collective Redundancy Directive	11
2.1.1 Corporate Responsibility	14
2.1.2 Looser Requirements for Multinationals?	15
2.1.3 Concluding on Collective redundancy Directive	16
2.2. Transfer of Undertakings (Acquired Rights) Directive	17
2.2.1. Procedures and Nature of the Directive	18
2.2.2. Cross-Border Application of the Directive	21
2.2.3. Applicability to Corporate Cross-Border Transfers	26
3. Cross-Border Transfers in Practice	29
3.1. Type (iii), Transfers from Third Countries into EC/EEA	29
3.2. Type (ii), Transfers from EC/EEA Member States To Third Countries	30
3.3. Type (i), Intra-Community (EC/EEA) Transfers	31
3.3.1. Case <i>Dethier</i> ; Further Basic Questions	33
3.4. Applicable Law	35
3.5. Concluding Remarks	36
4. Closing the Historical Circle	37
Chapter II:	
1. Social and Economic Factors in EC Law; Pyramid (Hierarchy) Thinking	39
1.1. Presenting Pyramid Thinking	39
1.1.1 A Politico-Socio-Economic/Citizenship Pyramid	42
1.1.2 The EU Social Pyramid	43
2. Criticizing Pyramid Thinking In General	45
2.1. The EU's Social Pyramid	47
2.2. Equal Pay	48
2.3. Free Provision of Services	49
2.4. Right to Strike	51
2.5. Safety of Machinery	52
2.6. Competition Rules v. Right to Collective Bargaining	60
2.6.1. Some Post-Amsterdam Remarks regarding <i>Albany</i>	63
2.7. Miscellaneous	63
3. Converse Pyramids in Earth. What Instead?	64
Bibliography	66

Foreword

The article “On Social and Economic Factors in Developing European Labour Law. Reasoning on Collective Redundancies, Transfer of Undertakings and Converse Pyramids” published in this report was written by the researcher Jari Hellsten. The report is the first publication from the research project “From Internal Market Regulation to European Labour Law”.

Looking at the interrelationship between social and economic factors is an interesting approach to EC employment law. The discussion has its concrete basis in existing EU legislation in the form of the Directives on Collective Redundancies and Transfer of Undertakings, both discussed in the first part of the report. It also reveals some new openings for a European debate, such as the cross-border applicability of the Transfer of Undertakings Directive, explored earlier by Professor Jonas Malmberg. The second part is mainly theoretical and contributes to understanding and explaining the developments and the state of the art of EU labour law, not just in the context of the internal market but also in a broader sense.

The project is financed by the Finnish Work Environment Fund, the Finnish Ministry of Labour and several Finnish trade union organisations. It has been conducted in cooperation with the Swedish National Institute for Working Life (Arbetslivsinstitutet) and its labour law research group. The project focuses on issues such as the social dimension of the free provision of services and of competition law, subjects which have been studied by the Arbetslivsinstitutet for several years.

The Finnish project is led by Niklas Bruun as research manager and Jari Hellsten as researcher. It is based at the Centre of International Economic Law (CIEL) at the Law Department of the Hanken School of Economics and Business Administration in Helsinki. The work does not emerge from a doctrinal vacuum since the project is well coordinated with the research activities in Stockholm. CIEL is engaged in permanent co-operation with the Institute and the Law Department at the Copenhagen Business School, one result of which is the EU labour law newsletter *EU & arbetsrätt*. As part of this collaboration the ideas of the second part of the report now published were subject to an extensive discussion in November 2004 with many useful comments and suggestions from the members of the EU labour law group at Arbetslivsinstitutet during Jari Hellsten’s visit to Stockholm. Since Arbetslivsinstitutet has established itself as the leading Nordic research environment for EU labour law it is well suited to publishing the article in its publication series “Arbetsliv i omvandling”. The choice of forum will hopefully result in the article reaching interested circles not only in the Nordic countries but also in other European Union member states.

On behalf of Jari Hellsten and myself I wish to express my thanks to the Finnish authorities and organisations for financing the project and to Arbetslivsinstitutet for publishing this report.

Stockholm, 10 May 2005

Niklas Bruun
professor

Abstract

This paper explores the relationship and interplay of economic and social dimensions in the EC legal order. The paper comprises two interlinked chapters. The first one includes a recap of the history until the 1970s of the E(E)C as necessary to discuss the directives on collective redundancies and transfer of undertakings (acquired rights). When EC employment law emerged in the 1970s, the Treaty of Rome remained intact, which means that only a change in the shared system of values explains this emergence. This change does not reveal any surprises in the Collective Redundancies Directive but with the Transfer of Undertakings (Acquired Rights) Directive the ‘what, when and why’ questions inevitably lead to a recognition of the cross-border applicability of the Directive. It is logical to assert that the Directive also covers cross-border corporate transfers. The transfers so governed occur between EC/EEA Member States and from them to third countries. This requires us to reconsider many of the central notions of the Transfer Directive. The natural normative question is: what are the rights and obligations transferred? It seems that at least the notion of transfer, economic dismissal reasons at a transfer, collective agreement and law applicable necessitate rethinking and even reconsidering settled case law. This way ‘social’ (fundamental social rights) faces ‘economic’ (fundamental economic freedoms) on a cross-border level. Corporate cross-border transfers highlight many of these problems which, besides, may depend on a Community approval of larger mergers.

The second chapter of the article explores some theoretical attempts to explain the relationship between economic and social. It first presents the theory of converse pyramids as maintaining a rather straightforward dominance – even up to *minutiae* – of economic (and an undistorted internal market) over social. Such a rigid hierarchy thinking maybe was justified until the 1970s. However, the author maintains that this theory is liable to several structural problems, linked even to the nature of the Community and its competence. The EC is a unique legal order, and its social constitution is *a fortiori* of such a nature. Examples concerning amongst others the right to strike, safety of machinery and competition rules in relation to collective bargaining (on the basis of case *Albany*) prove that precedence has been given, in at least some cases, to the social factor. Accordingly, sometimes, such as with safety of machinery, there is just one normative pyramid left. However, the author does not maintain any predicted dominance of the social factor either. It remains to be seen whether and to what extent the European Constitution will affect this issue.

Chapter I

1. On the Development of the Social Dimension in the EU

The Intergovernmental Conference in October 2004 adopted the Constitutional Treaty for Europe. Even as not ratified and entered into force, this landmark development justifies, with respect to social and labour law, a retrospective review of some important normative developments that have occurred since the foundation of the European Economic Communities.

My aim is to discuss the interplay of economic and social considerations since the beginning the European Economic Community. There is no doubt that the EEC was founded on an overwhelmingly economic Treaty. The social dimension was merely ancillary. However, it has grown significantly over the years and today the question about EC Labour Law is already justified - let it be that this historical continuum has no end. In other words, my thesis is that with the entry into force of the Treaty establishing a Constitution for Europe the originally ancillary social factor in the EU would finally attain in general terms an equal footing with the economic dimension. Still, the EU on the one hand remains bound by the internal market philosophy while on the other hand it already seems to be close to declaring a breakthrough of independent European Labour Law. However, in order to be able to assess the present situation and the likely shape of future developments, it is necessary to recap the history in its main outlines.

As a background factor I would mention that in reality the economic and social dimensions are inseparable. I would also mention that 'economic' and 'social' do have many meanings, depending on the context. These two underlying facts can be assumed to apply to everything discussed in this article without further repetition. There can e.g. be no real social rights without an adequate economic basis. All economic activity pays, but it is a separate issue whether we should be concerned with how much something pays if it does not destroy the payer, i.e. the employer. However, this distributive aspect is not explored further here. My main focus is on development of the justifications for European Labour Law, describing the path up to nearly declaring the breakthrough of a real European Labour Law. The fairness or integrity of the justifications is one important angle.

My historical coverage must also remain limited to the parts of EC labour law that are discussed here. I shall pick up from issues prior to Maastricht, especially the Directives on Collective Redundancies and Transfer of Undertakings.

1.1. Origin in the EEC Treaty

International agreements between independent states do not emerge in a social and political vacuum. Hence, before entering into reasoning on a European and at the same time normative level, it is appropriate to recall in brief the broad Europe-wide social climate in the founding Member States of the 1950's. I rely on a nutshell explanation given by Jean Degimbe, a high officer emeritus of the DG Social Affairs of the Commission.

When negotiating the Treaty of Rome, the wounds opened by the Second World War were barely healed. At the same time, economic expansion without precedent was already happening, which presumably helped to solve the social problems that were present after the war. Lack of manpower prevailed instead of unemployment. The majority of economic and trade union leaders assumed further growth in favour of employment and better working conditions. Among the social partners in the founding Member States, diversity existed, of course, but across the six states a strong culture of negotiation prevailed, often anchored in the war-time resistance. Besides, the communist trade union movement was strong in Italy and France. Therefore, it was understood at the time that the various European texts should not take initiatives that could have disturbed or been misunderstood by the political ‘circles’, by preferring (European) law instead of negotiations. All these factors formed at least one background reason why social policy did not gain more weight in the Treaty of Rome.¹ To this explanation I may just add that at an organisational level the social partners were more than halfway national: UNICE was certainly established in 1958 (with its roots tracing back to 1949) but the ETUC in its present form was established only in 1973.²

This broad explanation can be transferred to the normative level via the European Coal and Steel Community (ECSC). It shows that the contents of the EEC Treaty as to the role of social policy were not entirely inevitable. The ECSC incorporated some social dialogue and it included a wider competence for the High Authority of the ECSC than for the EEC Commission, even the competence to regulate minimum wages (Article 68 ECSC). The ECSC conducted an adaptation policy for surplus manpower (retraining) as well as for social housing. In sum, it was more social in its content than the EEC.³ But the ECSC embodied only a partial (functional and sectoral) integration, and the forthcoming EEC was functional too, especially after the failure of the draft European Political Community.⁴ Economic integration should precede political integration, as was highlighted in the Beyen Plan of 1952-3 and a later Benelux memorandum of 1955, the latter laying the foundations for the later conclusion of the EEC Treaty.⁵ The European *Economic* Community emerged.

While the leading Articles 2 and 3 of the Treaty of Rome did not include any ‘social policy’ (only the Preamble included it, in ‘economic and social progress’), the flag provision of the EEC’s social policy was for decades in Article 117 EEC. It first

¹ Jean Degimbe, *La politique sociale européenne, Du Traité de Rome au Traité d’Amsterdam*, p. 18-19. This is not to say that there would not have been struggles at the national level during 50’s. Further on, Degimbe also refers to a qualified diversity in legislation and praxis of the six states: between the German “Mitbestimmung” and the Italian and French praxis, there were even conceptual differences in trade unionism and also different approaches in leading economic activities.

² Degimbe denotes neutrally that at that time the power relations at the Community level were ‘strongly different’ from today, ‘notably from the social point of view’ (my translation). *Ibid.*, p. 61. See that the union side also started its cross-border co-operation within the European Coal and Steel Community.

³ See e.g. Brian Bercusson, *European Labour Law* (Bercusson 1996), p. 45-6, Degimbe, pp. 49-58.

⁴ See e.g. Kapteyn and van Themaat, *Introduction to the Law of the European Communities*, third ed. 1998, p. 9-13.

⁵ *Ibid.*, p. 11 and 13.

declared the necessity to promote improved working conditions and standard of living, 'so as to make possible their harmonisation while the improvement is being maintained' (upward harmonisation). It then added a credo, as follows:

'[The Member States] believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and the approximation of provisions laid down by law, regulation or administrative action.'

How did this almost religious faith in the fruitful effect of the Common Market emerge at the intergovernmental level, next to the socio-political developments mentioned above?⁶

The Treaty founders relied on two preceding reports: an economic report produced by the ILO (Ohlin Report)⁷ and an economic-political Spaak report.⁸ The latter's broad line as to policy areas to be harmonised, as well as to the institutional structure of the Community, was realized quite as such in the Treaty of Rome.⁹ Both reports rejected any general harmonisation in the social sphere, counting on the market's basic ability to correct distortions of competition. The Ohlin report anyway noted the economic impact of differences in social legislation and benefits¹⁰ that might justify harmonisation in certain limited areas such as equal pay and working time. In the case of harmonisation, the report foresaw that clarity would be required. Otherwise trade would be seriously distorted and the harmonising measures would not be directed against the essential prerogatives of the States concerned.¹¹ However, in general terms the report relied on higher productivity balancing the burden of better social standards. Changes in exchange rates were a possible further means of achieving the same balance, thus preventing any 'race to the bottom'. This position also relied essentially on '... the strength of the trade union movement in European countries and

⁶ I recall that Article 100 EEC (now Article 94 EC) also required – to work as a legal base for E(E)C law approximating national laws etc. – a *direct* effect to the establishment or functioning of the common market.

⁷ International Labour Office, 'Social Aspects of European Economic Cooperation' (1956) 74 International Labour Review (ILR) 99.

⁸ Officially : Rapport des Chefs des Délégations, Comité Intergouvernemental, 21. Apr. 1956. The whole report is available in French on the address http://aei.pitt.edu/archive/00000996/01/Spaak_report_french.pdf. In German it is e.g. in Schulze und Hoeren, Dokumente zum Europäischen Recht, Band 1, Gründungsverträge; Springer, Berlin 1999, p. 752-822. An abridged English version (20 pages) is available on the address <http://aei.pitt.edu/archive/00000995/>.

⁹ Catherine Barnard, however, refers (Barnard, EC Employment Law, 2nd ed., Oxford 2000, p. 4), to Otto Kahn-Freund who has asserted that the Spaak committee's views were perhaps not as clearly reflected as might have been the case, perhaps because the relevant provisions were drafted only at the end of a crucial conversation between the French and German Prime Ministers. Kahn-Freund, 'Labour Law and Social Security', in American Enterprise in the European Common Market: A Legal Profile, eds. Stein and Nicholson (University of Michigan Law School, Ann Arbor, Mich., 1960)

¹⁰ ILR, p. 85

¹¹ Ibid., p. 116.

the sympathy of European governments towards social aspirations, to ensure that labour conditions would improve and not deteriorate.’¹²

The Spaak report was built essentially on regarding workers and employees as market factors.¹³ Free movement of labour was seen as crucial for any prosperity but otherwise the Community should not interfere in the States’ powers to regulate working conditions. Hence, the EEC Treaty essentially enshrined only the free movement of workers, supplemented by the European Social Fund (Article 123 EEC) and the co-ordination of social security for migrant workers (Article 51 EEC, now 42 EC). However, former Judge of the European Court of Justice, *G. Federico Mancini* has succinctly described the status of labour law in establishing the Community. I present it here as explained by Lord *Wedderburn* of Charlton, with his quotations. Hence, according to *Mancini*, the Treaty of Rome was concerned primarily with the creation of ‘a European market based on competition’; employed labour was only ‘inextricably involved’; the free movement of labour may have ‘beneficial social effects’, for example on discrimination or low pay: if so, all the better – but ‘it is nothing more than that’.¹⁴ *Catherine Barnard* has called this basic structure ‘a victory for the classic neo-liberal market tradition: there was no need for a European-level social dimension because high social standards were “rewards” for efficiency, not rigidities imposed on the market.’¹⁵ - The limited nature of Community labour law in the beginning of the EEC must also be assessed in the light of the state of national labour law in the six founding Member States at that time. In broad terms, it was still in its post-war evolution and did not contain much basis for Community regulation.

In describing the features of EC labour law as enshrined in its initial Treaty model *Spiros Simitis* and *Antoine Lyon-Caen* in their essay *Community Labour Law: A Critical Introduction to its History*¹⁶ set forth (and distinguish) three elements: (i) harmonisation, (ii) justification for regulatory activity for the Community and (iii) statist or public syndrome.

(i) As a perceived principle, Article 117 EEC proclaimed ‘upward harmonisation’ but Article 100 included as a method only the ‘approximation’ of law, which meant a realistic coexistence of different social systems. Upward harmonisation, as carefully distinguished from either co-ordination or approximation, was ‘not concerned with the expression of legal rules, only their teleology’.¹⁷

¹² Ibid., p. 87.

¹³ See e.g. pages 19-20, 60-1 and 88-91 of the Spaak report.

¹⁴ Lord Wedderburn of Charlton, *European Community Law and Workers’ Rights After 1992: Fact or Fake?* In Lord Wedderburn, *Labour Law and Freedom, Further Essays in Labour Law*, Lawrence & Wishart, London 1997, p. 251. In his note 17 (p.275) Lord Wedderburn refers to Mancini, ‘Labour Law and Community’, (1985) 20 *Ir. Jur. (n.s.)* 1 at pp. 2, 12, 15.

¹⁵ Barnard, *EC Employment Law*, 2. ed., Oxford University Press 2000, p. 2.

¹⁶ In Davies et al., (eds.), *European Community Labour Law, Liber Amicorum Lord Wedderburn*. Clarendon Press, Oxford 1996, pp. 1-22.

¹⁷ Ibid., p. 4 where (in footnote 9) they refer to Rodière, ‘L’harmonisation des législations européennes dans le cadre de la CEE’, [1965] *Revue trimestrielle de droit européen*, p. 336. – Judge Romain Schingten has remarked that one should read Article 117 in the context of the Preamble of the Treaty (economic and social progress, second recital), as well as in the light of Article 2 EC (high level of social protection and raising of the standard of living). He, too,

(ii) ‘Justifications’ for Community legislation *Simitis* and *Antoine Lyon-Caen* note as restrictive, being linked exclusively to competition. Besides, they note how Community experience ‘to date’ [until 1995-96] supports the thesis that no such approximation is necessary.¹⁸ They further ask how one might distinguish between selfish or opportunistic action by enterprises and a genuine distortion, and ‘what argument will demonstrate convincingly that some particular disparity is likely to affect the functioning of the Common Market’. While these arguments were still raised against the draft Posting Directive during the 1990’s, they conclude how, ‘[a]t all events, the close tie between Community social policy and the requirements of competition lends all its weight to a severe diagnosis which has lost none of its relevance: “the Treaty of Rome did not go as far as the 1919 Treaty of Versailles went”’.¹⁹

(iii) The third element in the initial model for *Simitis* and *Lyon-Caen*, the ‘statist or public syndrome’ meant that the Treaty, notwithstanding the conviction that labour law is in every Member State a result of independent evolution, conferred on the Community authorities the power to construct a form of Community labour law, however limited its justifications and scope. At the same time this crucially meant action covering only public entities, state provisions and co-operation between Member States (under Article 118 EEC). Hence, no social partners were seen or recognized by the text of the original Treaty.

Resuming, *Simitis* and *A. Lyon-Caen* describe this model as

‘social harmonisation as its perceived principle, competition as its dynamic, and an institutional view of labour law as associated with the State...’²⁰

This conclusion *Simitis* and *Lyon-Caen* anchored by referring to three cases. In *Zaera* the Court affirmed that Article 118 in no way affected the regulatory competence of individual Member States in the social field.²¹ Already in *Defrenne III*²² it declared that Article 117 was essentially programmatic. In *Sloman Neptune* it asserted that ‘Article 117 of the EEC Treaty is essentially in the nature of a programme. It relates only to social objectives the attainment of which must be the result of Community action, close cooperation between Member States and the operation of the Common Market.’²³

ex cathedra notes the social factor as corollary and some kind of sub-product of the reinforcing economic power. Schintgen, *La longue gestation du droit du travail communautaire: De Rome à Amsterdam* ; in *Mélanges en hommage à Fernand Schockweiler*, Nomos, Baden-Baden 1999, p. 551-2.

¹⁸ Ibid., p. 5.

¹⁹ Ibid., p. 5-6.

²⁰ Ibid., p. 6.

²¹ Case 126/86 *Zaera* [1987] ECR I-3696, paragraph 16. In *Zaera* the Court however added that while Article 117 EEC was programmatic, it was to be taken into account in interpreting and applying the other provisions of the EC Treaty and secondary Community legislation in the social field; paragraph 14.

²² Case 149/77 *Defrenne III* [1978] ECR 1365.

²³ Case C-72/91 *Sloman Neptune* [1993] ECR I-887, paragraph 25.

The broad analysis of *Simitis* and *Lyon-Caen* is easy to share. The original Treaty was controversial in itself and foresaw no social partners. In sum, the lot of any community social and labour law was hard in the beginning of the EEC. Together with monetary and budgetary policies, social policy remained, as the Spaak report recommended, purely a matter for the member state governments.

As to competition-linked provisions in the Treaty, two addenda are still in place. First, Article 91 EEC was enacted as a measure against possible dumping in the internal market. There is no way of linking this with its possible application of social grounds. Presumably such practice never appeared. It was only in the Treaty of Amsterdam that this provision was repealed. Second, as further safety valves against market distortions, Articles 101 and 102 were enacted, justifying Community action to combat distortions of competition due to disparities in existing or draft laws. In theory, these provisions also covered distortions due to disparities in labour law.

From today's perspective it is, however, worth noting that already the Spaak report mentioned areas for corrective and distortion eliminating action: equal pay, working time, as well as overtime bonuses and paid holidays.²⁴ This 'second pillar' of European labour law *Maximilian Fuchs* has denoted, referring to *Rolf Birk*, as 'labour law motivated by competition'.²⁵ However, in this way the Spaak report already incorporated the future 'duality' (or interplay) between the economic and social dimensions. In any case, following equal pay in Article 119 EEC, the retention of the existing equivalence of paid holiday schemes was enshrined in Article 120 EEC. This provision still exists in Article 142 EC; it was not referred to by the Working Time Directive 93/104/EC (WTD) notwithstanding the minimum paid annual holiday established by the WTD. Furthermore, it appears in rudimentary form even in the Treaty establishing a Constitution for Europe (Article III-215), but for whom and what?

A third prominent example of these 'aspirations of competitive labour law' was the third Protocol annexed to the EEC Treaty on 'Certain Provisions Relating to France'. According to its letter, the Commission was to authorise France to take protective measures if the establishment of the common market did not lead, by the end of the first stage (1962), regarding the basis for overtime payments (hours worked beyond which overtime pay was due) and the overtime payments themselves, to a result corresponding to the average in France in 1956. France never invoked this safety valve. And without checking, it is evident that in the preparations for the 1993 Working Time Directive nobody read out this Protocol in a Council Working Group or in the European Parliament.

²⁴ The Spaak report denotes these as both sources for distortion (p. 62-3 of the French report, p. 791 in the compendium of Schulze and Hoeren) and as in any case subject to a special effort of progressive harmonisation measures (p. 65-66 of the French report, p. 793 in Schulze and Hoeren).

²⁵ Fuchs, *The Bottom Line of European Labour Law* (Part I), *IJCLIR*, Vol. 20/3 2004, p. 158. He refers to Rolf Birk, 'Arbeitsrecht – Freizügigkeit der Arbeitnehmer und Harmonisierung des Arbeitsrechts', in: C.O.Lenz (ed.), *EG-Handbuch. Recht im Binnenmarkt*, 2nd ed., Herne/Berlin, 1994, p. 369.

1.2. Summing up the Founding History of the EEC

Historically the end result of the European project as a European *Economic Community* was a semi-inevitable outcome. It meant, modifying a little the description of *Simitis* and *A. Lyon-Caen* of European labour law, social (upward) harmonisation as its *proclaimed* principle; competition as its dynamic; and an institutional view of labour law as something that was associated with the State. The sole piece of law dealing with a social issue, was essentially the market orientated free movement of workers.

Following the functional integration idea (theory) the EEC also established, in its particular way, the dichotomy between the economic and the social dimensions. With the almost sole exception of gender equality, there was the corresponding competence dichotomy between the Community and the Member States. Hence, the economic and social dimensions were, at this level, in a broader sense but also normatively divided. The point is that at the EEC level the division between economic and social became crucially more highlighted than is at present the case nationally. At the national level it is easier to see that, as in real life, the economic and social dimensions are not divisible, while on the *normative* level the division is, of course, everywhere. However, in real life wage (or salary) for a worker (or employee) is a social factor, up to Omega, but it is at the same time pecuniary, i.e. it is economic. From an employer's point of view it is at least economic. It may also have a social dimension too, but I will not explore for the present whether it is relevant to speak about the social meaning of pay from an employer's point of view. In addition, no social benefit can be realised without the necessary economic foundations.

The original EEC Treaty, even with its fragmented social provisions and its ideological and practical dominance of economic integration, still managed to incorporate the necessary foundations for future development including development of the interplay between the economic and social dimensions. In trying to explain this I will use the normative instrument of dividing (or dissecting) the economic and social dimensions.

European social and labour law developed very little from the beginning of the Common Market until the early 1970's (one exception to this was Regulation 1612/68).²⁶ In order to cover in this paper the broad line of developments up to today, I will pass over this early dormant period in this paper.

2. New Wave of 1970s

During the 1970's the Community increased essentially its legislative activity in social matters. This took place without changing a comma in the EEC Treaty. The Equal Pay Directive (75/117/EEC),²⁷ the Collective Redundancy Directive

²⁶ I recall that the debate on the Commission's possibility to come up with initiatives was high from the beginning. See e.g. Kåre F. V. Pedersen, *Steg för steg in i framtiden*, Arbetslivsinstitutet, Sverige, Arbetslivsrapport 1997:12, p. 6-8.

²⁷ Officially: Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

(75/129/EEC),²⁸ the Equal Treatment Directive (76/207/EEC)²⁹ and the Transfer of Undertakings Directive (in UK called the Acquired Rights Directive; 77/187/EEC)³⁰ were adopted. It is also appropriate to add to this wave the so-called Insolvency Directive (80/987/EEC).³¹ The confirmation in the case *Defrenne II*³² of the direct effect of Article 119 EEC on gender equality in pay fits into the same wave.

We may ask: what was behind this legislative activism? There are several explanatory political and economic factors. First, trade unions became more active *vis-à-vis* the Community since the late 1960's. During the same period, especially in France and Italy, a strong political movement occurred being directed at modifying the prevailing economic policy and system. Thus, the standing tripartite Standing Committee on Employment was founded in 1970 and the European Social Fund was reformed in 1971. In addition, important political moves concerning the EEC occurred in Germany and France. Chancellor Willy Brandt 'had several reasons for making the development of an EEC social agenda an early goal of the new German political philosophy. He and his party, the Social Democrats, were committed to social progress, particularly in the employment field. In addition, the introduction of Community worker protection and worker rights legislation compatible with German legislation would undercut the argument of German employers that the proposed domestic legislation would reduce the competitiveness of German industry. Community employment legislation would also eliminate the incentive for employers to shift investment from Germany to other European countries.'³³ In France President De Gaulle retired in 1970 and his successors were much more Europe-minded. The United Kingdom, Ireland and Denmark joined a Community in which the Franco-German axis was dominant.

At the same time, the first signs of future economic problems were seen as the Community acquired three new Member States.

With this background the Heads of State (with the new Member States' presence) decided to give a signal in favour of the social dimension of the Community. The communiqué of the Paris summit in 1972 noted that economic expansion was not a goal in itself but it was especially a means of alleviating differences in standard of living. The economy also required the participation of all of the social partners. This should lead to better quality of life. It also noted that the Member States

²⁸ Officially: Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

²⁹ Officially: Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

³⁰ Officially: Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

³¹ Officially: Council Directive of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

³² Officially it was case 43/75 *Defrenne v. Sabena*, [1976] ECR 455.

³³ M Shanks, 'The Social policy of the European Communities' (1977) CMLR 377. Michael Shanks was Commissioner for Social Affairs in 1970's.

‘attached as much importance to vigorous action in the social field as to the achievement of Economic and Monetary union. They consider it essential to ensure the increasing involvement of labour and management in the economic and social decisions of the Community.’

Following this, the Council on 21 January 1974 adopted the Commission’s proposal for a Social Action Programme.³⁴ It included more than 30 different measures, but strictly read, only three direct and new legislative initiatives were mentioned: the Transfer of Undertakings and Collective Redundancy Directives. The third initiative was achieving gender equality in access to employment and vocational training, advancement and working conditions (realised via the Equal Treatment Directive 1976/207/EEC). Already before the adoption of the Action Programme the Commission had submitted a proposal for an Equal Pay Directive (1975/117/EEC). The progressive involvement of workers and their representatives in the life of undertakings was a fifth issue in the sense that it later led, after preparations lasting some twenty years, to the European Works Council Directive 94/45/EC. A sixth issue in the field of employment law was ‘the designation as an immediate objective of the overall application of the principle of a standard 40-hour working week by 1975, and the principle of four weeks annual paid holiday by 1976’; thus an objective and a principle. The latter became realised by the Working Time Directive 93/104/EC but the former is just inside the 48 hours’ week that includes over-time work. A seventh issue in employment law was the protection of workers hired by temporary employment agencies. No legislative instrument was expected, and the issue is still open.

An interesting offshoot was the commitment ‘to facilitate, depending on the situation in the different countries, the conclusion of collective agreements at the European level in appropriate fields’. This, the legal preconditions included, was also subject to debate in the doctrine.³⁵ From today’s perspective this idea is easy to describe as ultra-voluntaristic at that time, given the normative base in the EC Treaty. However, the mere inclusion of this point in the Action Programme reflects an attempt to create something new.

It is a matter of taste whether these four directives and three issues (as added to by the offshoot) are sufficient to qualify this new approach as a social policy approach or *sozialstaatlicher* (social policy) approach as the German term used by *Maximilian Fuchs* reads.³⁶ Given the market-driven Treaty of Rome, maybe the term is justified in the EC context, as backed up by the measures outside employment law (on migrant workers, vocational training, social security, safety and health etc.). *Jeff Kenner* has

³⁴ OJ C13, 12.2.1974.

³⁵ See e.g. Gérard Lyon-Caen, *Négociation et convention collective au niveau européen*. *Revue trimestrielle du droit européen*, 9(1) janv.-mars 1973, p. 589-593.

³⁶ Fuchs, p. 159. In *The Bottom Line of European Labour Law* (Part II), Fuchs denotes the period of 1970s as ‘the heyday of European social policy-making and European labour law; *IJLLIR* Vol. 20, Issue 3, 2004, p. 436. In the conclusions, loc.cit. p. 443, he describes it how ‘the genuinely social concern adopted by national labour law systems managed to establish itself on the European stage’, as reflected by the 1974 Social Action Programme. I don’t doubt this ‘genuinely social concern’ as such. I, however, denote that it wasn’t too powerful on the European stage, as my example of the Collective Redundancy Directive, explained *infra*, shows. It remained essentially procedural.

called it a 'New Deal' that was intended to give the Community a 'humane face'.³⁷ Commissioner Shanks has asserted that it:

'...reflected a political judgment of what was thought to be both desirable and possible, rather than a juridical judgment of what were thought to be the social policy implications of the Rome Treaty.'³⁸

In the context of 'what was both desirable and possible', it is clear that resorting to the enactment of secondary EC law in the field of labour law in a way meant a recognition that the Common Market, contrary to what is implied in the Treaty (Article 117 EEC), did not bring about any quasi-automatic approximation, let alone harmonisation, of national social systems. Under their heading 'Impasses' *Simitis* and *A. Lyon-Caen* manifest this by referring to the Green Paper of 1975 on employee participation where the Commission stated candidly:

'A sufficient convergence of social and economic policies and structures in these areas will not happen automatically as a consequence of the integration of Community markets.'³⁹

The Commission, however, tempered this judgement with some hope, by stating:

The objective is gradual removal of unacceptable degrees of divergence between the structures and policies of the Member States.'

Because the objective was not enforced by any instrument, integration of the market did not nurture harmonisation, but rather disparities just seemed to increase. For *Simitis* and *A. Lyon-Caen*, 'as a consequence, the initial plan lost all credibility.'⁴⁰ They note the lack of real questions about the credibility of an EC social law ('unified Europe with a social ambition') and further pick up a prompted search of new vocabulary: 'the appearance of the word 'convergence''. This did not just reflect exhibited growing uncertainty but – for *Simitis* and *A. Lyon-Caen* – affected the very conception of Community social policy, witnessed by the manner in which it was partially recast in the Single European Act.⁴¹ Hence, *Simitis* and *A. Lyon-Caen* clearly mean the withdrawal from any real attempt towards upward harmonisation as masked by this 'convergence'. We will come across this magic word later in my explanation of the Collective Redundancy Directive.

'Harmonisation' ('alignment') was another magic word, forming the link or synthesis, as *Bercusson* puts it, between the European labour *law* and social *policy*. Expressing the latter in the language of the Common Market law resulted in this harmonisation (alignment) by directives of the 1970's that are reflected in an ECOSOC publication of that time: The Stage Reached in Aligning Labour Legislation in the European

³⁷ Jeff Kenner, *EU Employment Law*, Oxford 2003, p. 24.

³⁸ M Shanks, *European Social Policy Today and Tomorrow* (1977), p. 13. Quoted by Brian Bercusson, *op.cit.*, 51.

³⁹ Employee Participation and Company Structure, Green Paper of the Commission of the European Communities, EC Bull., SU 8/75, p. 10. Referred to by *Simitis* and *Lyon-Caen*, p. 7. The point was the role of employees in the decision-making process within companies.

⁴⁰ *Ibid.*, p. 7.

⁴¹ *Ibid.*, p. 8.

Community.⁴² We will also find ‘harmonisation’ in the Collective Redundancy Directive, questionable as to its credibility.

Whatever term (harmonisation, convergence, social policy approach, New Deal) is used, this legislative activity had Article 94 (ex 100) EC as the legal base, apart from Article 308 (ex 235) EC for the Equal Treatment Directive (76/207/EEC). Both Articles employ in their very wording the effect of national and EC law on the common (internal) market.⁴³ The simple reason for resorting to Articles 94 and 308 EC was that the original Social Chapter of the Treaty did not contain any legal base like Article 42 (ex 51) in social security. It is therefore appropriate to look a bit deeper into the directives on Collective Redundancies and Transfer, so as to verify to what extent the common market effect was a real one or whether it was just paying lip service for an appropriate choice of the legal base. These two directives *a priori* did have the possibility of enacting on core issues in an employment relationship.

These directives are fruits of the common market thinking, as applied in 1970’s. Although their basics are still in force today, I will take the liberty of describing them up to the present. I will later on note the possible effect of the Treaty amendments and the 1989 Social Charter of the EU.

2.1. Collective Redundancy Directive

The Collective Redundancy Directive (CRD), with Article 100 as its legal base, is a landmark of the legislative activity of the 1970’s, a time-related product of the market-orientated social (employment) law of the EEC. Its basics have not evolved since then. Some of its features describe the overall state-of-art in EC employment law, even up to today. It further addresses the problem of the interaction of, or the striking of a balance between the economic freedom of an employer to stop his activities (or to be imposed to do so in liquidation) and the needs and/or social rights of the workers concerned.

Both the original directive (75/129/EEC) and the present one (98/59/EC) refer in the Preamble (third Recital) to an ‘increasing convergence’ of national provisions as to procedure but also, remarkably, to measures ‘designed to alleviate the consequences of redundancy for workers’. I will mention the background to the directive. In 1973 AKZO, a Dutch-German multinational enterprise in chemicals, engaged a major restructuring by dismissing some 5,000 workers as a consequence of the oil crisis. The apparent strategy was to dismiss workers in countries where it was cheapest to do so.⁴⁴ The ensuing outrage led to a proviso in the Social Action Programme and to the Directive in 1975. While the Preamble of the directive (first Recital) regarded it as important to afford greater protection to workers, the Directive was still adopted as being essentially procedural. And so it is still today.

⁴² Economic and Social Committee of the EEC, Brussels 1978, p. iv; referred to by Bercusson, *European Labour Law*, Butterworths, London 1996, p. 51.

⁴³ Article 94 EC deals with approximation of national rules that ‘directly affect the establishment or functioning of the common market’. Article 308 EC may be resorted to as a legal base for EC measures ‘necessary to attain, in the course of the operation of the common market...’ The difference in wording is not worth of too much attention.

⁴⁴ Blanpain, *European Labour Law*, 7. rev. ed., Kluwer Law International 2000, p. 381.

Dismissing where cheapest is a rather manifest ‘common market effect’. Redundancy (severance) payments are, next to being essential factor in dismissal costs, core provisions in alleviating the consequences of mass redundancies for workers. Still, the original directive only imposed an obligation to consult workers’ representatives on the means of mitigating the consequences of redundancy, with a view to reaching an agreement. The revision in 1992 (92/56/EEC) supposed that such payments are made, and, if so, imposes an obligation to consult the employee representatives on ‘the method for calculating any redundancy payments other than those arising out of national legislation and/or practice’ (Article 2(3)(vi)). The amendment of the Directive in 1998 was only of a consolidation nature and naturally kept this watered-down solution. The reality still today is that there are essential differences in redundancy payments. The broad line is that there are no statutory or collective agreement-based payments in Finland and Denmark (except for certain white collar workers) while in Sweden since 2004 the payments are covered by a confederal collective agreement between the Swedish LO and the employers central organisation Svenskt Näringsliv (Confederation of Swedish Enterprise). The highest payments are in Austria, Germany and Spain.⁴⁵ In the new Member States such payments exist at least in Hungary, Poland and Czech Republic.⁴⁶ In its last official proposal of January 2002 on corporate restructuring, the Commission misleadingly asserted that fair compensation in the form of redundancy payments would be a ‘well-established practice in all [the then 15] Member States’.⁴⁷

Hence, the Preamble of the original Directive referred, after the ‘increasing convergence’, this being the new jargon of the 1970’s⁴⁸, to the ‘measures designed to alleviate the consequences of redundancy for workers’, as does the Directive in force (of 1998). Still, the Directive does not harmonise the most essential alleviating measure, at the same time also the most essential cost factor, namely the severance payments.

However, one may also see a real ‘common market effect’ in Article 4(1) of the directive, according to which

‘Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in

⁴⁵ On the major differences of these payments, see Jari Hellsten, Provisions and Procedures Governing Collective Redundancies in Europe, Finnish Metalworkers’ Union; September 2001 (Hellsten 2001). As an example of high payments one may refer to a case called ‘Kimberly Clark’, in fact *France v. Commission*, C-241/94 [1996] ECR I-4551. The judgment denotes the key figures (paragraph 28). A paper mill in Rouen, France, dismissed 207 workers and salaried employees. The collective agreement concerned required average severance pay of EUR 21,340 (FF 140,000). The sum fixed in the social plan that was implemented was EUR 60,260 (FF 395,000) inclusive of training contribution. In addition, the State Employment Fund paid training aid (that was regarded as prohibited state aid). First phase of consultation of the Community cross-industry and sectoral social partners, p. 13;

⁴⁶ See Hellsten (2001).

⁴⁷ See the document Anticipating and managing change: a dynamic approach to the social aspects of corporate restructuring.). First phase of consultation of the Community cross-industry and sectoral social partners, p. 13;

http://www.europa.eu.int/comm/employment_social/labour_law/docs/.

⁴⁸ See the description of Simitis and Lyon-Caen on p. 4, *supra*.

Article 3 (1) without prejudice to any provisions governing individual rights with regard to notice of dismissal.’

This *de facto* set up a minimum length for negotiations. Besides, Article 4(3) enabled the authorities to prolong the period up to 60 days and accepted even wider extension powers enacted by the Member States.⁴⁹ In this sense the right to prolong the negotiation period up to 60 days was a peculiar mix of a minimum and maximum provision. In the end, the 60 days’ maximum is not strictly true, and, indeed, Article 5 stated and still states the minimum nature of the Directive. However, setting up the minimum length of negotiations, unless the authorities accept a shorter period in given cases, is a relatively small interference in the functioning of the (labour) market and imposes the necessary time frame for, in most cases, seeking solutions for retraining and other mitigating measures. Hence, the directive is essentially procedural. It does not lay down substantives rules as to which reasons and circumstances justify dismissals.

Bercusson discusses the harmonising effect of the Directive, also by referring to two surveys covering Belgium, France, Germany, Italy and UK. The first one, concerning redundancy provisions in the textile industry, revealed essential differences also after the Directive both in consultation and selection procedure, and in financial compensations. The second survey, concerning formal law in these countries revealed essential differences regarding the definition of ‘collective dismissal’, procedures prior to dismissal and redundancy payments. In conclusion, he states ‘it is difficult to describe this process as, or ascribe it to, a wholly effective policy of harmonisation of labour law in the European Community’.⁵⁰

The European Court of Justice has also discussed the nature of the Collective Redundancy Directive. Amongst others the lack of employee representation generated the infringement case *Commission v. United Kingdom*.⁵¹ The Court characterised the directive, as follows:

16 By harmonising the rules applicable to collective redundancies, the Community legislature intended both to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for Community undertakings.

This characterisation of general type e.g. *Catherine Barnard* has presented as marking a recognition of the dual nature, economic and social, of the Collective Redundancy Directive.⁵² The dual nature is true, indeed by definition: it is difficult, if not impossible, to find real protection of workers (social factor) that would not cause costs (economic factor) to the employer. However, even the harmonisation of procedure was just partial, as the Court noted later in the judgment (paragraph 25). It

⁴⁹ See Article 4(3), second subparagraph.

⁵⁰ Bercusson 1996, p. 53-64; citation at 64. The survey on the textile industry was first published in *European Industrial Relations Review* No 51 (March 1978), p. 7; referred to by Bercusson 1996 on p. 62. The survey on formal law was published in *European Industrial Relations Review* No 76 (May 1980); Bercusson 1996 p. 63 refers to a table on its p. 19.

⁵¹ Case C-383/92.

⁵² Catherine Barnard, *EC Employment Law*, second edition, Oxford, University Press, 2000, p. 24.

was sufficient to invalidate (i.e. to declare as contradicting with the Directive) the traditional voluntary trade union recognition system in the UK (paragraphs 26-7 of the judgment). A further necessary clarification concerning this case is in that the Court by no means assessed the cost factor but obviously deduced the economic (cost) factor expressed in paragraph 16 from the first Recital of the Directive that referred to 'taking into account the need for balanced economic and social development within the Community.'⁵³ There was no point in the case necessitating any such assessment of costs. In fact, so far as I know, no official document of the EC machinery entails any comprehensive assessment of these costs. They are left hanging in the air while any expert accepts that the cost factor is still a real thing.

However, one may still maintain that the Court's reference to harmonising the costs of collective redundancies as a purpose of the Directive was essentially illusory. It harmonises them only in so far as the employer is burdened by the minimum period (30 days) for negotiations prior to giving the notice.

2.1.1 Corporate Responsibility

Within the procedural framework there is, however, one provision that is worthy of remark, namely the establishment by the 1992 amendment (Directive 92/56/EEC) of a corporate responsibility in Article 2(4). The information and consultation obligations

'shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.'⁵⁴

Article 2(4) means in practice that a daughter company must hold the consultations before the mother company decides on redundancies. Otherwise there is a breach of procedure, leading to compensation for the workers. The Explanatory Memorandum of the proposed Amending Directive gave details on the impact of the internal market. Growing internationalisation was seen as resulting increasingly in cross-border corporate restructuring of companies on which there was a loophole in the original directive. The Amending Directive was intended to block it by setting up a strict responsibility on the daughter company for decisions taken. The structure was not, however, a complete novelty because already in case *Rockfon A/S v Specialarbejderforbundet i Danmark* the ECJ confirmed the interpretation that the employer could not free itself from the directive's obligations by entrusting, in a group of companies, decision-making to a unit separate from the employing unit.⁵⁵ In

⁵³ The same statement still flourishes in the second Recital of the Directive in force, 98/59/EC.

⁵⁴ On this provision, see e.g. Bercusson 1996, p. 230-3.

⁵⁵ Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 30.

sum: establishing this corporate responsibility had a real common market reason, and the Amending Directive was intended to improve the position of workers. Within this procedural framework the economic and social factors were combined.

As *Bercusson* has pointed out, in the preparations of the original directive there was some debate about also covering the grounds for dismissal. At least France wanted this. It ‘considered that the aim of the directive should be to protect workers against collective dismissals. But the text proposed by the Commission...was more concerned with the interests of the undertakings.’ German and UK delegations reported that the proposal of the Commission was intended to establish criteria by which the labour market worked properly.⁵⁶ Anyway, given the reference in the Preamble also to Article 117 EEC, it would have been a reasonable expectation that the directive would have tackled at least the level of redundancy payments. While this did not happen, the cost balancing effect of the directive in reality is confined to the effect of establishing the minimum period for negotiations, if it is discernable at all.

In covering the deficiencies in the Collective Redundancy Directive, it is necessary to mention how the obligation to alleviate the consequences of mass redundancies is weakened by being only an obligation to consult the employee representatives on these measures. There is no European framework set up for a social plan although there are examples that are well established (with necessary traditions) in Austria, Belgium, France, Germany and the Netherlands. They, too, imply an essential cost factor.

*2.1.2 Looser Requirements for Multinationals?*⁵⁷

A further issue falling under the common market effect would have been, by definition, the substantive grounds for collective dismissals that are mainly the so-called ETOP-reasons: economic, technical, organisational and productivity reasons.⁵⁸ Another aspect is that the directive covers comprehensively any reason that is not linked to the workers.⁵⁹ Anyway, the question on substantive grounds, i.e. appreciation of the ETOP-reasons is in a common (internal) market context emphasized by the further pinpoint whether the grounds are looser for multinational companies. I maintain that in future, not just internationally but also within the internal market, as enlarged in 2004, we will face relocations *à la* Hoover (France – Scotland in 1994) towards the new Member States with radically lower wage and overall production costs. Immediately, a sharp question arises whether a simple drive to greater profit justifies closures and redundancies in ‘old’ Member States. The issue

⁵⁶ Bercusson 1996, p. 51. Citations presented by him, with reference to European Industrial Relations Review No 2 (February 1974), p. 2 at pp. 3 and 5; No 4 (April 1974), p. 18 at p. 19.

⁵⁷ This section draws on Hellsten 2001, p. 35-6 but merits to be also presented in this wider context discussing the development, scope and rationale of EC employment law.

⁵⁸ On ETOP-reasons, as well as on governing collective redundancies in general in Denmark, France, Germany, Italy, Netherlands, Spain and UK, see Umberto Carabelli and Leonello Tronti (eds.), *Managing Labour Redundancies In Europe: Instruments and Prospects*. Labour, Volume 13, Number 1, Blackwell Publishers 1999.

⁵⁹ See e.g. a recent judgment *Commission v. Portugal*, C-55/02, 12.10.2004, nyr. Portugal has infringed its obligations because the national implementation law covered only redundancies for structural, technological or cyclical reasons. E.g. liquidation cases fall out.

is also by definition linked to Transfer of Undertakings Directive while the closures and relocations may well take place within a multinational group of companies (maybe even in the context of a merger of two multinationals). Other way round, the Transfer Directive includes provisions (in Article 4) on dismissals by ETO-grounds (economic, technical or organisational grounds), and one essential issue is, of course, which entity on the employer side satisfied these ETO-grounds.⁶⁰

To simplify, at least in Austria, Belgium, France and Germany the national law defines dismissing with ETOP-reasons as an *ultima ratio*. This tends towards dismissing simple profit-maximisation as legally valid grounds for a closure and/or transfer of production within the national jurisdiction. A national SME presumably cannot escape such an *ultima ratio* condition. While CDR is silent on dismissal grounds, it seems that the only real brake or imperative for multinationals comes from their need to safeguard their image, i.e. that a too rough closure/redundancy policy might harm their image and make it less attractive. Besides, a multinational often has possibilities to adjust its economic results in its different units. Furthermore, the case law referred to by *Gérard Lyon-Caen* from France hints towards the outcome that a multi-sectoral multinational has no corporate responsibility to help its divisions if they get into trouble. In conclusion, *Gérard Lyon-Caen* asserts that we come close to admitting that different, and looser, rules exist for multinationals, as this is manifest to an increasing extent.⁶¹

This issue, i.e. whether there are looser rules for multinational companies regarding dismissal grounds, should be debated officially in the EU. They are forerunners in relocating production to new Member States within the internal market, as well as to third countries. The issue is, whether they are entitled to do it with the sole purpose of improving profitability. Irrespective of whether the answer is ‘yes’ or ‘no’, these relocations may happen with the benefit of EU subsidies from the Cohesion Fund or state aids accepted under Article 87(3) EC. This just sharpens further the question about fair compensation for workers made redundant from establishments that are closed down in the ‘old’ Member States. If the answer is ‘no’, the conditions for it should become defined by the EU. If the answer is ‘yes’, as stated above this further sharpens the question about fair compensation (redundancy payment) to workers made redundant. This would be a minimum in balancing economic and social factors regarding the Collective Redundancy Directive.

2.1.3 Concluding on Collective Redundancy Directive

My conclusion on the Collective Redundancy Directive is clear. The original Common Market intention was and still is in fact real, and the first Recital promised and still promises greater protection for workers, but the corpus Articles keep very little thereof. Except the strict responsibility of the daughter company in Article 2(4), the Directive remains essentially procedural. My thesis is that the enlarged internal market imposes an obligation to reconsider this lack of substantial protection. On the

⁶⁰ See section 2.2, ‘Transfer of Undertakings (Acquired Rights’) Directive’, *infra*.

⁶¹ Gérard Lyon-Caen, *Sur le transfert des emplois dans les groupes multinationaux*. *Droit social*, mai 1995, pp. 489-494. The case he refers to is Thomson, Cour de cassation 5.4.1995. This French conglomerate transferred a tv-tube factory from Lyon to Bresil.

other hand, the EC Treaty since Nice offers the tiny possibility of legislating on termination of employment contracts by qualified majority, if the Council first unanimously takes a decision to apply it (Article 137(3) EC, last sentence).

2.2. Transfer of Undertakings (Acquired Rights') Directive

The Transfer of Undertakings Directive is, especially as to its scope, a Pandora's box with some 40 judgments of the Court of Justice, augmented by several rulings of the EFTA Court. I will leave out most of the details in the case law and discuss only two interesting aspects directly connected with the common market justification, effect and nature of the Directive: the procedure and cross-border applicability of the Directive.

As usual, the common (internal) market context in the Directive is described in its Preamble with short terms, only, as follows:

- (2) Economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers.
- (3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.
- (4) Differences still remain in the Member States as regards the extent of the protection of employees in this respect and these differences should be reduced.

While every word is potentially significant in this description, I will pass over any detailed reasoning thereon in this article and concentrate on my two main points. However, the scope is worth a couple of general remarks. First, it is essential to understand that the Directive, since its amendment by Directive 98/50/EC, also covers undertakings in the public sector if they are engaged in economic activities, whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive (Article 1(1)(c)). On the other hand, the Directive does not apply to seagoing vessels (Article 1(3)). It is reasonable to suppose that there are detailed rules in national laws and that there are particular problems related to employment conditions of seagoing staff. Nonetheless, it is a legitimate expectation that the European legislator would openly ground this kind of exclusion that has been valid already for nearly 30 years. Seagoing staff is in principle in special need of protection by European law, procedural rules included, due to working onboard. However, in conclusion one may state that the traditional double purpose and interplay of economic and social factors is denoted as the rationale of the Directive.

2.2.1 Procedures and Nature of Directive

The procedural part, hence information for and consultation of employee representatives in the Transfer Directive includes certain but now negligible differences in relation to the Collective Redundancy Directive. This is illustrated by infringement case *Commission v. UK* of 1992 (hereinafter 'Transfer judgment').⁶² As in its sister infringement case concerning UK law regarding collective redundancies,⁶³ explained *supra*, the Court of Justice confirmed that the traditional, voluntary trade union recognition system in UK did not comply with the compulsory employee representation scheme of the Transfer Directive. It seems clear that the cross-border applicability of the Directive also creates tension in its procedural provisions. The question about possible/alleged cross-border information, consultation and negotiations arises. I will take the liberty of leaving it as a question in this paper, without attempting to answer it.

In addition the overall purpose of the Transfer Directive was described in terms identical to those in the sister case: ensuring comparable protection for workers' rights and harmonising the costs for employers (paragraph 15 of the Transfer judgment). As in the sister case, neither did this case display any real analysis of the cost factor. Further on, also in this case the Court noted the purpose of partial harmonisation on the procedures. One has to see the reference to workers' rights and harmonisation of costs as an overall description by the Court, without that having any real legal consequences. It is also noteworthy that Advocate General did not present this dual purpose of the Directive.⁶⁴

The dual purpose as noted by the Court is, of course, true in the sense that the Directive deals with workers' rights that in this case have a direct cost effect. The elementary provision in the Directive (Article 3(1)) transfers the obligations arising from an employment contract or relationship to the transferee, by virtue of the transfer. This was a direct penetration into UK law that foresaw a termination of a work contract in the context of such a transfer.⁶⁵ Furthermore, the Directive guarantees in (now) Article 3(3) the previous working conditions, as follows:

Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.

Whether a cliché or not, this provision means a certain prohibition (for at least one year) against competition with low (or lowered) labour standards, even a fundamental

⁶² Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435.

⁶³ Case C-383/92 *Commission v United Kingdom* [1994] ECR I-2479. The Court gave this judgment, as well as the judgment referred to in the previous note, by sitting in plenum.

⁶⁴ Joint Opinions (on 2 March 1994) of Advocate General Van Gerven in cases *Commission v United Kingdom*, C-382/92 and C-383/92.

⁶⁵ See e.g. Catherine Barnard, *op. cit.*, p. 446.

prohibition, as *Bercusson* has described it. Even in the French law the Directive imposed changes, at least in protection of workers' representatives, transfer of debts and safeguarding the workers' rights arising from collective agreements.⁶⁶ The prohibition is just emphasised when read together with the principle of continued employment relationships.⁶⁷ However, the economic or managerial prerogative was guaranteed by enshrining already in the original Article 4(1) that the Directive does not prevent dismissals for ETOP-reasons.⁶⁸ In Germany the interpretation of the national implementing law (*Bürgerliches Gesetzbuch*, Section BGB 613a) has meant a rather straightforward application that Labour Courts quite easily hold dismissals within the guaranteed period as consequences of the transfer, leading to essential compensation. Besides, such a lawsuit reflects an individual right which is not possible to outlaw in a collective solution (agreement) in a transfer situation. This often leads to individual agreements in which the worker resigns with a considerable severance payment.⁶⁹

However, enshrining the right to dismiss for ETOP-reasons has lead *Fuchs* to denote the dual nature of the directive, but differently from that marked by the Court in the case *Commission v. UK*. Namely, *Fuchs* interprets 'economic' in the overall legal construction in such a way that the Directive does not endanger (or challenge) restructuring of enterprises by transfers (mergers included).⁷⁰ The right to dismiss with ETO-reasons finally guarantees this restructuring as such while the absolute prohibition against competition with low (or lowered) labour standards, at the end of the day, is limited to one year following the transfer. Hence, in discovering the most fundamental issue within the dual (economic and social) nature of the Directive, it seems logical to adhere to the position of *Fuchs* instead of that expressed, in general terms and *obiter dictum*, by the Court in the case *Commission v. UK*. *Fuchs* highlights, as I do, the realisation of restructuring; differing from this the Court referred to harmonising costs. The Directive harmonised the costs, indeed, but only to the extent of the period of one year with guaranteed working conditions.

Seen from another angle, the Transfer Directive was and still is important because it introduced collective agreements into the normative structure of EC employment law. It used and uses them as direct sources of rights, even though any definition of the agreements was left up to national law. The original Collective Redundancy Directive

⁶⁶ See A. and G. Lyon-Caen, *Droit social international et européen*, 8th ed., Dalloz 1993, p. 306, fn 2.

⁶⁷ Bercusson 1996, p. 235.

⁶⁸ Article 4(1) (first subparagraph): 'The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.' To be precise, Article 4(1) counts only 'ETO-reasons' (economic, technical or organisational ones) while productivity related ones are not counted.

⁶⁹ Experience from Finnish multinationals show that these payments for people made redundant in Central Europe can be even of some 60.000 to 80.000 euros plus possible retirement benefits.

⁷⁰ Fuchs, *The Bottom Line of European Labour Law (Part II)*, *IJCLLIR* Vol. 20, Issue 3, 2004, p. 437.

did not recognise them at all,⁷¹ and even the revised Directive 92/56/EC used them only indirectly, requiring information concerning planned severance payments if they deviated from the collective agreement concerned. At a similar level, hence as a direct source of law, the EC legislator used collective agreements as direct instruments in employment law just in the Posted Workers' Directive in 1996 (96/71/EC).

A further difference in relation to the Collective Redundancy Directive was the penetration of EC law into individual employment relationships that the Transfer Directive established. In that sense it was elementary for the development of EC employment law. The biggest part of the ECJ's 40 or so rulings concerns the very definition of a transfer, i.e. the scope of the Directive. The most important in this sense is the case *Christel Schmidt*.⁷² The Court (fifth chamber) concluded that the Transfer Directive was to be 'interpreted as covering a situation in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee'. *Fuchs* denotes how the Court has often attempted to solve the problems that have arisen by applying an extensive and teleological interpretation based on the aim of protecting and ensuring employee rights as found in the Preamble.⁷³

As to the broad line of the Transfer Directive, changes in 1998 by Directive 98/50/EC were essential ones, when it e.g. established the corporate responsibility in Article 7(4) as in the Revised Collective Redundancy Directive (Article 2(4) of Directive 92/56/EC). The definition of a transfer was also added in 1998, based on case-law and it now reads as follows:

1. (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

The amendments in 2001 were of consolidation, only. One may well criticise the definition as being still vague as *Mulder*, who does not discuss any cross-border applicability of the Directive, does in his recent monograph.⁷⁴ On the other hand, he equally regrets that the structure is rigid and that there is no space for practical solutions by collective agreements.⁷⁵ Well, in fact there is space for better, hence stronger, national laws and collective agreements due to the minimum nature of the

⁷¹ See that Article 2(1) of the CRD imposes to negotiate with the aim to reach an *agreement*. It clearly can be a collective agreement under a national Act on Collective Agreements (if there is any; there isn't in UK and Denmark).

⁷² Case C-392/92 *Schmidt* [1994] ECR I-1311.

⁷³ *Fuchs*, op.cit., p. 437.

⁷⁴ Bernard Johann Mulder, *Anställningen vid verksamhetsövergång*, Iustus Förlag, Lund 2004, p. 349. He finds it as a 'vague and undefined wording in the Directive'.

⁷⁵ *Ibid*, p. 357 (in English summary).

Directive (Article 8). In this sense it is a *sui generis* product of the Common Market thinking of the 1970's, having kept this strong tie to the 'market' where employees are *de facto* commodities to be bought and sold. Remarkable is also that the Council kept the legal basis of Article 94 (ex 100) EC, without any objection by the Parliament. As a whole, the Transfer Directive represents a logical path of evolution, where the Court has been the driving force. I leave aside in this paper whether the judicial activism of the Court has maintained its line after *Schmidt*.

From a constitutional point of view one may of course ask whether it still is logical to keep Article 94 EC as the legal basis for an instrument whose 'main purpose is...to ensure that restructuring of undertakings within the Common Market does not adversely affect the employees in the undertaking concerned.'⁷⁶ Article 94 EC keeps the European Parliament in a consultative position, while Article 137 EC as the basis would lead to co-decision in applying it. Obviously, the codification itself explains this.

2.2.2. Cross-Border Application of the Directive

While the Transfer Directive is the crystallisation of the single market justification in EC employment law in force, it is strange that out of some 40 preliminary rulings of the Court on this Directive (plus six rulings of the EFTA Court), there is no European case involving a cross-border transfer. Does the Directive apply to such transfers, when the employer e.g. relocates a factory from one Member State to another? The answer is in the interpretation of Article 1(2) that reads, as follows:

This Directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.

The Commission published its first proposal for the Directive soon after adoption of the Social Action Programme by the Council in 1974.⁷⁷ Already that proposal gives the final answer to the basic question about the cross-border applicability of the Directive. Namely, the Commission laconically reasoned, as follows:

'From the territorial point of view it appears necessary to protect the rights of workers whether these changes in undertakings take place within the territory of one Member State or within the territories of Member States.'⁷⁸

Hence, the cross-border applicability was a deliberate intention. A further consideration was that the protection should cover transfers from a Member State to a third country, as follows:

⁷⁶ COM (94) 300 final, 8 September 1994, paragraph 1.

⁷⁷ See COM (74) 351 final/2 of 29.5.1974. The title was 'Proposal for a directive of the Council on harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations.'

⁷⁸ *Ibid.*, p. 5.

‘For the same reasons it appears necessary to extend Community legal protection for workers to cover changes which take place in undertakings within the territory of one or more Member States and within that of a non-member country.’⁷⁹

Here, too, no hesitation is noted. Thus, in principle the Directive covers a case in which a US multinational company decided to relocate a plant from Finland to China. However, the Commission saw the enforcement problems involved, as follows:

‘For legal reasons, however, it is not possible to impose the planned Community rules on non-member countries. In such cases, therefore, Article 1 provides for the application of this proposed Directive only in so far as undertakings situated within the territory of the Common Market are involved. This can be of practical importance first and foremost when undertakings or plants in non-member states are incorporated in undertakings situated in the Community.’⁸⁰

Again, the proposal is convincing. The China case is covered, as to obligations burdening the transferor within the Community. Equally, a transferee within the Community is subject to the Directive’s rules. But the Commission went on, as follows:

‘But the proposed Directive is also legally applicable when undertakings or companies situated in the Community are incorporated in undertakings in non-member states. This is the case when the change *affects* the rights of workers in plants which, irrespective of such incorporation, are situated in the territory of a Member State and to which the laws of that Member State are applicable in accordance with the rules of international private law.’⁸¹ (italics by JH)

The rights in a Member State bestowed by the Directive clearly cover first and foremost dismissal protection where the core of the Directive according to Article 4(1) means that the transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. Employment relationships are transferred. A separate issue crucially is who may resort to dismissals for economic, technical or organisational reasons. This issue formed one of the two questions answered in judgment *Dethier*, delivered in 1998. The outcome *prima vista* looks simple: both transferor and transferee may resort to ETO-dismissals.⁸² However, I will come back to this point (see section 3.3.1) in discussing the practical consequences of a cross-border application of the Transfer Directive.

However, coming back to the principal cross-border effect, the Commission proposed a corpus text in Article 1, as follows:

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Case C-319/94 *Jules Dethier Équipement SA v. Jules Dassy and Sovam SPRL*, paragraph 37, ECR [1998] I-1061.

‘...irrespective of whether such merger or takeover is effected between undertakings in the territory of one or more Member States or it is effected between undertakings in the territory of member States and undertakings in the territory of member States and undertakings in third countries.’⁸³

In 1975 the Commission published a revised proposal that strengthened further this cross-border aspect. With the logic of the 1974 proposal it proposed a corpus text in its draft Article 1(3), as follows

‘This Directive shall apply where and insofar as the transferring or dependent undertaking is situated in the territory of the Member States of the European Economic Community or the transfer or concentration affects an undertaking within that territory involved in such a transaction.’⁸⁴

This proposal led to the adoption of the Directive in 1977 with Article 1(2) in the form still in force, as quoted above. The wording was shortened but the logic of a basic cross-border applicability was kept. At the same time, the Council replaced the expression ‘the territory of the *Member States*’ of the 1975 proposal by a more straightforward ‘the territorial scope of the *Treaty*’. This illustrated the non-significance of national borders in this context, taking cross-border transfers as something that would arise naturally within the territorial scope of the Treaty.⁸⁵

I would like to develop the argument on Article 1(2) briefly with a somewhat simplified CILFIT-test.⁸⁶ First, there are linguistic differences in other places of the Directive, but not here regarding the cross-border applicability as such.⁸⁷ It is of course true that notions like ‘undertaking’, ‘business’ and ‘a part of a business’ might become more difficult to handle on the European rather than on a national scale, but I will set this aside now. Second, the wording in Article 1(2) purely textually operates with the location of the business or undertaking to be transferred. It might be unclear

⁸³ See COM (74) 351 final/2, fourth page of the text including the draft directive (there is no page numbering in this part of the COM document). The Preamble (the sixth ‘whereas’) backed this up with the following wording: ‘Whereas workers must be likewise safeguarded where the merger or transfer is effected in the territory of the Community and the acquirer is a person or undertaking situate[d] in the territory of a third State.’ The expression ‘situate’ is unambiguous in this context; for clarity’s sake I add a letter ‘d’.

⁸⁴ See COM (75) 429, p. 4 of the text including the draft directive. Its grounds in the sixth ‘whereas’ of the Preamble read, as follows: ‘Whereas employees must likewise be protected in the territory of the Community where a person or undertaking situated in the territory of a third country is involved in the transaction.’ Ibid, p. 3. Underlining is original. The Preamble of the Directive 77/187/EEC, as adopted, did not include any such ‘whereas’. This perhaps paved the way for the cross-border application becoming de facto forgotten.

⁸⁵ In fact, lacking ‘the Member States’ in the very wording of Article 1(2) first drew my attention in exploring a possible cross-border applicability of the Directive. Otherwise the Directive includes 18 references to different legislative options within the Directive plus that the Directive is a minimum Directive, as enacted in Article 8. Indeed, the Member States have no substantially legislative role concerning the territorial ambit as defined by Article 1(2).

⁸⁶ Case 283/81 CILFIT [1982] ECR 3415. As to a CILFIT test, see e.g. Tuomas Ojanen, *The European Way. The Structure of National Court Obligation Under EC Law*, Gummerus Kirjapaino Oy, Saarijärvi 1998, p. 192-96. As to case *CILFIT*, also see footnote 187, *infra*.

⁸⁷ As to these differences, see e.g. case 135/83 *Abels* [1985] ECR 469. I pass here to what extent the present Directive 01/23/EC manages to iron out the differences.

whether the seat of management or of actual activities is decisive if they are in different Member States. *Jonas Malmberg* notes that a permanent place of running the business might decide, not the formal location of the seat of management.⁸⁸ However, in most cases the seat and business place are in the same country. Hence, purely textually, Article 1(2) operates with a business situated within the Community, broadened now by the EEA; thus, Iceland, Lichtenstein and Norway are also covered. A textual interpretation thus leads to the conclusion that it covers cross-border transfers. This is confirmed by the lack of any contravening element in the text. Third, a contextual interpretation, bound first to the Common Market of 1970's, leads to the same interpretation. Namely, there was no real reason, and it would have been in fact illogical, to exclude the protection from cross-border transfers. Besides, given the clear intention of the Commission to cover cross-border transfers it would have led to a storm if the Council had tried to invalidate it. Nothing shows such an intention and it would be insulting to suppose that there would have been any such hidden agenda.

Further on, the European legislator repeated Article 1(2) TD as such in the amending directive 98/50/EC. This is elementary in interpreting the EC law provision concerned in its historical context, in the light of its *travaux préparatoires*, in its evolution and application, and finally in the light of Community law as a whole. Besides, the interpretation of 'Community law as a whole' has to be effective and consistent as judgment *Albany*, paragraph 60, tells us.⁸⁹ I therefore maintain that the cross-border applicability of the Transfer Directive is a fact of EC law.⁹⁰ This is also the starting point of *Jonas Malmberg* in his excellent article 'Arbetsstagares ställning vid gränsöverskridande företagsövergångar' where he reasons over 15 pages mainly on the practical consequences of this as to jurisdiction, choice-of-law and practical consequences of changes in the labour law applicable.⁹¹ I believe that the reason for the lack of any European case law on this provision is that trade unions and employees have either been unable to bring the cases to courts, or they have reached negotiated solutions that have excluded the court.

The only somewhat grey issue regarding the cross-border application of the Directive is the fact that the Council in 1977 dropped from the wording of Article 1(2) the second element of the 1975 proposal, namely the applicability of the Directive by virtue of an *effect* of a transfer:

'...the transfer or concentration *affects* an *undertaking* within that territory *involved* in such a transaction...'

⁸⁸ Jonas Malmberg, Arbetsstagares ställning vid gränsöverskridande företagsövergångar, Svensk Juristtidning 2004 No. 4, p. 794-5. He refers to Lunning & Toijer, Anställningsskydd, 8 uppl. s. 243, and to Klingsten, Ansättningsretlige aspekter ved virksomhedsoverdragelse, DJØF 2002, p. 17.

⁸⁹ See case C-67/96 *Albany International* [1999] ECR I-5751. The English wording of paragraph 60 ('interpretation of the provisions of the Treaty as a whole which is both effective and consistent') is a bit clumsy. The French version ('interprétation utile et cohérente des dispositions du traité, dans leur ensemble') proves that 'effective' and 'consistent' do qualify the interpretation, not the Treaty. – As to judgment *Albany*, see Chapter II, section 2.6, *infra*.

⁹⁰ It is, by definition, a case as such whether the national implementing laws manage to realise this. I pass it in this paper.

⁹¹ See footnote 97, *infra*.

This draft proviso either would have broadened the applicability even to transfers taking place between employers (companies) established outside the EEC, or it would have established good grounds to maintain so. Therefore, because it was ambiguous and it lacked enforceability outside the Community, the Council obviously dropped it. The inevitable conclusion seems to be that there is a lack of any protection under EC law for transfers from third countries into the EC (and EEA), as well as for formal transfers between two countries outside the EC/EEA. These transfers may adversely affect the position of workers who are already employed by receiving companies. The former feature is what *Catherine Barnard* has also found, calling it ‘a significant gap in the protection of workers’. I know there is a similar lack in national laws. However, she does not discuss further the cross-border applicability of the Directive to cross-border transfers within the EC/EEA.⁹²

However, this was the ‘what, when and why’⁹³ of the wording

‘...undertaking, business or part of a business to be transferred is situated within the territorial scope of the Treaty.’

Thus, how it became the very tool in the territorial applicability of the Directive. It applies to cross-border transfers. It is finally clear that only this interpretation is in harmony with the establishment of the *Common Market* and its evolution to the *Single Market*, reaching now the qualification of the *Internal Market*. One has to see this cross-border applicability also in the light of the philosophy prevailing on the Internal Market: a development of *improving* working conditions as enshrined already in Article 117 EEC that (i.e. the improvement) for a part should ensue ‘from the functioning of the common market’. It still lies in Article 136(3) EC. The Treaties are not blind to a gaping hole in the protection of workers when they face the very crux of the internal market effect at issue: a *cross-border* transfer of an undertaking whose simple motive is just an improvement of *profitability*. There is no hole, as I am sure will be confirmed by a court judgment in future.

⁹² Catherine Barnard, *EC Employment Law*, 2. ed., Oxford University Press 2000, p. 469. She also notes the exclusion of a transfer between subsidiaries outside the EEA whose head office, only, is located within the Community. As to other literature, e.g. Silvana Sciarra (ed.), *Labour Law in the Courts*, Hart Publishing, Oxford 2001, includes 98 pages dealing with the Directive, produced by Davies, Laulom, Valdés Dal-Ré and Lo Faro, but none of them seems to discuss cross-border transfers.

⁹³ See Spiros Simitis and Antoine Lyon-Caen, 1996, (see note 15) p. 3, assert that it is better not to think EC law solely as a product of the legal system itself or as a compromise of the social forces. Both may be true at the one and same provision. Hence, Simitis and Lyon-Caen highlight that there is no EC labour law *per se*. The implication is obvious: what has to be studied is when and why a shared system of values emerged, qualifying the concepts we have on EC labour law. To my mind, the same approach (‘what, when and why’) is *mutatis mutandis* normally useful at separate norms, too.

2.2.3. Applicability to Corporate Cross-Border Transfers

There remains one important question, namely the applicability of the Directive when the cross-border transfer takes place within an international group of companies (consolidated corporation).

The necessary additional issue of applying the Directive to a group of companies is in Case *Allen et al. v. Amalgamated Construction Co. Ltd*⁹⁴ in which the European Court of Justice gave its preliminary ruling on 12 December 1999. I will hereinafter refer to it, with one exception, as *Amalgamated Construction* because this better captures the *essentiale* of the case. Even the very titles of the proposals of the Commission for the Directive in 1974 and 1975 referred to ‘the retention of the rights and advantages of employees in the case of mergers, takeovers and *amalgamations*’ (italics by JH). The applicants in the main proceedings were twenty-three of the miners who worked for Amalgamated Construction Co. Ltd (ACC) until they were made redundant. They were taken on, after a break of a weekend, only, by its sister company AM Mining Services Limited (AMS) under less beneficial terms and conditions of employment. Being later made redundant by that company, they were taken on again by ACC but with worse employment conditions than those earlier applied to them by ACC. The miners claimed these previous conditions with their suit. ACC and AMS belonged to AMCO Corporation PLC (AMCO) that had some ten other companies within the AMCO Group. There was a Group headquarter which performed certain functions, such as personnel, payroll and accountancy, on a central basis for the subsidiary companies.

The rationale for the European Court of Justice in blocking this kind of *spiral*, instead of a direct race, to the bottom within a group of companies was to apply to it the Transfer Directive that is normally, and tellingly, called the Acquired Rights Directive in the UK. The judgment follows the Opinion of Advocate General *Ruiz-Jarabo Colomer* who presented a succinct but sufficiently detailed overview *ex officio* of the previous case law and he consistently applied it and the purpose of the Directive in this concrete case.⁹⁵ With his framework the Court reasoned and concluded on the applicability to a group of companies, as follows:

16. The Directive is therefore applicable where, following a legal transfer or merger, there is a change in the natural or legal person responsible for carrying on the business who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred (Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 12, and Case 324/86 *Tellerup v Daddy's Dance Hall* [1988] ECR 739, paragraph 9).

17. It is thus clear that the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard.

⁹⁴ Case C-234/98 *Allen et al. v. Amalgamated Construction Co. Ltd*. [1999] ECR I-8643.

⁹⁵ Opinion delivered on 8 July 1999.

There is nothing ambiguous in this assertion. The Directive does cover transfers between subsidiary ('sister') companies within a corporate business structure. Besides, I recall that this conclusion is a natural consequence of previous case law. It was just a small Chamber of the Court that 'visited' Ny Mølle Kro in 1987 and then Daddy's Dance Hall in 1988 but these landmark cases, too, were part of a natural evolution.⁹⁶

Unusual but telling in *Amalgamated Construction* at the same time was the argument put forward by the employer (the alleged transferee) that a group of companies fell outside the Directive because the subsidiaries are not autonomous economic actors. Hence, the employer resorted to the hard core of any Internal Market regulations: competition rules that notoriously are fundamental in the internal market.⁹⁷ The Court weighed this argument *vis-à-vis* the social purpose of the Directive, as follows:

18. That conclusion [i.e. to apply the Directive to transfers within a group of companies] is not affected by the judgment in *Viho v Commission*, cited above, [⁹⁸] in paragraphs 15 to 17 of which the Court held that Article 85(1) of the EC Treaty (now Article 81(1) EC) does not apply to relations between a parent company and its subsidiaries where those companies form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action on the market, but carry out the instructions issued to them by the parent company controlling them.

Thus, the Court outlawed the argument in law without any hesitation. It then gave its two grounds, the first one reading, as follows:

19. That concept of undertaking is specific to competition law and reflects the fact that, without the concordance of economically independent wills, relations within an economic unit cannot constitute an anti-competitive agreement or concerted practice between undertakings within the meaning of Article 85(1) of the Treaty.

This meant that the employer had put forward arguments in the wrong context. A clearer translation might perhaps express, at least in Euro-English the fact that competition rules cannot apply to agreements within a group of companies because the subsidiaries are not independent. The authentic French wording spells this out better.⁹⁹ However, the second argument, in fact the concluding argument in weighing

⁹⁶ As to these cases in this evolution, see Barnard, *EC Employment Law*, Oxford University Press 2000, p. 455-7.

⁹⁷ I rhetorically recall paragraph 36 of case C-126/97 *Eco Swiss China Time v. Benetton* [1999] ECR I-3055, where the Court stated, as follows: '36 However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.' The keywords of the judgment are: 'Application by an arbitration tribunal, of its own motion, of Article 81 EC (ex Article 85)' and 'Power of national courts to annul arbitration awards.' It deals with the very judicial constitution of the EC.

⁹⁸ See Case C-73/95 P *Viho v Commission* [1996] ECR I-5457.

⁹⁹ '19 En effet, cette notion d'entreprise est propre au droit de la concurrence et résulte du fait que, en l'absence de concours de volontés économiquement indépendantes, les relations au sein d'une unité économique ne peuvent être constitutives d'un accord ou d'une pratique

competition rules and the social purpose of the Directive, came one step further, as follows:

20. *Nothing* justifies a parent company's and its subsidiaries' uniform *conduct on the market having greater importance* in the application of the Directive than the *formal separation* between those companies which have distinct legal personalities. That outcome, which would exclude transfers between companies in the same group from the scope of the Directive, would be *precisely contrary to the Directive's aim*, which is, according to the Court, to *ensure, so far as possible, that the rights of employees are safeguarded* in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor (see, in particular, *Ny Mølle Kro*, cited above, paragraph 12, and *Daddy's Dance Hall*, cited above, paragraph 9). [italics by JH]

The outcome is easy to summarise: the social purpose of the Directive weighed more than the economic governance factor (or any competition law thinking). ‘Nothing’ justified an outcome *a contrario*. One may also presume that there will never come a ‘something’ to turn this conclusion one day the other way round. It also shows the context, role and reach (*‘so far as possible’*) of the safeguarding effect of the Directive. Even though this reasoning comes only from a Chamber, it is not merely *obiter dictum* but a precise stock-taking of the principal defence of the employer. I think it is worth presenting again later in this article when discussing on a more general level the interplay and balance between economic and social factors in the EU (see chapter “On Pyramid (Hierarchy) Thinking”¹⁰⁰).

The Court followed in full the proposal of Advocate General Ruiz-Jarabo Colomer. He just used a few more words in arguing the invalidation of the competition law argument.^{101 102} I maintain that the (*ad astra*) absolutely same ‘nothing’ in *Amalgamated Construction* applies equally to cross-border transfers and therefore nothing justifies an exclusion of cross-border *corporate* transfers from the scope of

concertée entre entreprises, restrictifs de concurrence au sens de l'article 85, paragraphe 1, du traité.’

¹⁰⁰ See Chapter II, section 2.7, *infra*.

¹⁰¹ See paragraphs 45-47 of the Opinion. For him the competition law argument was just an *aberratio ictus*, a hit in the air, and ‘of no assistance...in deciding’ on the applicability of the Directive to transfers within groups of companies (paragraph 47).

¹⁰² A case quasi-identical to *Amalgamated Construction* is *C-449/93 Rockfon A/S v Specialarbejderforbundet i Danmark* [1995] ECR I-4291. It concerned the interpretation of Article 1 of Directive 75/129/EEC on Collective Redundancies. Paragraphs 29 and 30 show that an ‘establishment’ forming part of a group, as well as the group itself, cannot, by playing with an establishment’s dependant position, to circumvent the Directive’s obligations. In paragraph 30 the Court stated, as follows: ‘[...] an interpretation of the term “establishment” like that proposed by Rockfon would allow companies belonging to the same group to try to make it more difficult for the Directive to apply to them by conferring on a separate decision-making body the power to take decisions concerning redundancies. By this means, they would be able to escape the obligation to follow certain procedures for the protection of workers and large groups of workers could be denied the right to be informed and consulted which they have as a matter of course under the directive. Such an interpretation therefore appears to be incompatible with the aim of the Directive.’

the Directive. Corporations or their constituent parts can be formed, sold, bought, merged etc. as much as the owners decide. The essential point of labour law is that it takes or regulates the employer and employees taken together, not the latter as puppets tied to the owners' pens. This is also the core of the Transfer Directive that is intended to allow the workers 'to remain in employment with the new employer on the terms and conditions agreed with the transferor' (end of paragraph 20 of *G. C. Allen and Others v. Amalgamated Construction CO. Ltd*). At the same time it is a real thing.

I conclude that the Transfer Directive does also cover corporate cross-border transfers.

3. Cross-Border Transfers in Practice

Given my reasoning *supra*, it is necessary to test it in brief on concrete cases. They are from a legal point of view, so far as I can see, of three types: (i) an intra-Community transfer, hence between two EC/EEA Member States; (ii) a transfer from an EC/EEA Member State to a third country; and (iii) from a third country to an EC/EEA Member State. Any fourth alternative is not relevant, I think, because the Council in 1977 dropped from the scope of the Directive transfers between sister companies with a seat outside EC/EEA and just a headquarters in the EC/EEA.

An inevitable preliminary context is the practical transfer of the workers and employees concerned. In real life it takes place only seldom, mainly involving executives and some experts. Anyway, the right to move is by definition covered by the fundamental right to free movement within the EC (type (i)). In fact, it is not just a right but EC law (the very Transfer Directive) even pushes, or, as stated *ex curia*, allows them the opportunity to *remain in employment with the new employer on the terms and conditions agreed with the transferor*¹⁰³ - the workers and employees to move along the transfer. I repeat that I will set aside now an essential part of the practical and legal difficulties linked up to this, and would again refer to the presentation of *Jonas Malmberg* in SvJT.¹⁰⁴

An elementary doctrinal paradigm is that it is impossible to give fully-fledged answers to all the problems that the cross-border applicability of the Transfer Directive reveals. Hence, I will have to leave many issues as, hopefully, relevant questions.

3.1. Type (iii), Transfers From Third Countries into EC/EEA

I take the liberty to say some words first on type (iii), a transfer from a third country into EC/EEA. I first venture to repeat my presumption that there are hardly any national employment laws dealing with this type of case. The right to enter the EC,

¹⁰³ See *Amalgamated Construction*, paragraph 20, quoted *supra*.

¹⁰⁴ See footnote 88, *supra*.

i.e. the immigration law also enters this legal framework and this seems to be worthy of further reasoning (but not here). The only landmark exception in the employment law (mainly dismissal and possible career rules) worthy of separate reasoning in another place, might be the Swedish system of selection order, in which the employees are qualified (put into a dismissal order; ‘turordning’) strongly depending on their entrance to service. It is a detailed legal structure, to an essential degree governed, or governable, by collective agreements with particularities *à la suédoise*.¹⁰⁵ Workers and employees transferred enter the system but then we face the question on the dismissal rules that perhaps bound the transferor. In any case, the second ruling in case *Dethier*¹⁰⁶ seems to mean that the extra-Community workers and employees may address claims against an intra-Community transferee.

The minimum nature of the Transfer Directive might also have relevance under type (iii). Additionally, the terms and conditions / rights and obligations transferred might even be exotic ones, in theory, because the business transferred under this type can come from any place in the world. There can be special questions even linked to fundamental rights.¹⁰⁷ It is clear that the EC/EEA applies its fundamental rights in such a case. But I close case (iii) in this paper.

3.2. Type (ii), Transfers From EC/EEA Member States to Third Countries

Reasoning on the case of type (ii) is *a priori* heavily dominated by the lack of any enforceability outside EC/EEA – with perhaps relevant exceptions e.g. in the case of Switzerland which has special arrangements with the EU/EEA. When a US headquarters in 2004 decided to relocate an accumulator factory from Kemijärvi, Finland, to China, it seems reasonable to suppose that the removal, quite apart from the practical quasi-impossibility of the workers moving, did not give much scope for the application of EU Directives. EC law is not enforceable in China. The enforceability problems diminish if the parties agree to apply Finnish law to those who are removing. However, the question about the protection guaranteed by the Transfer Directive also arises in this case, even if it is in, let us say, normal cases enforceable only against the transferor within EC. Here we come close to enforceability making social protection a real thing.

But, and here comes the hard point derived from the purpose of the TD, as applied in *Dethier*: dismissals shortly before the transfer by the transferor may be in many cases unlawful under Article 4 TD. Here we might face even some mailbox problems if let us say the company running the plant in Kemijärvi happens to be ‘emptied’ before relocating the factory to China. This is what might be a relevant angle. Without

¹⁰⁵ As to a nutshell explanation on order of selection, see e.g. Tore Sigeman, Employment Protection in Scandinavian Law, in Peter Wahlgren (ed.), *Stability and Change in Nordic Labour Law; Legal Abbreviations*. Scandinavian Studies in Law, Volume 43, Stockholm Institute for Scandinavian Law, 2002, p. 270-1.

¹⁰⁶ See section 3.3.1., *infra*.

¹⁰⁷ As an example, let it be other way round, I may mention the case of Saudi-Arabia where e.g. collective agreements are still banned. This became clear in judgments of the Labour Court of Finland, cases TT 169/1979 and TT 135/1980, concerning construction works of a Finnish company in Saudi-Arabia. The Finnish collective agreement of building sector also covered works carried out abroad by workers posted from Finland.

trying to point out any separate case I note that we might face situations where it is even justified to maintain abuse (such as by establishing a mail box headquarters outside the EC/EEA) of EC law occurring, especially *if* the transferor's right to resort to ETO-dismissals is recognized for cross-border transfers. In case *Centros* the Court had to take stock on a case where a Danish family company registered its seat in the UK and wanted to register only a branch in Denmark despite all the business occurring only in Denmark. By this means the company evaded the application of the rules governing the formation of companies which in Denmark are more restrictive as regards the paying up of a minimum share capital. As imposed by the Treaty, the Court had to accept this. However, the Court – with all 15 judges present – added a safety valve against any abuse of EC law by stating in the second part of the ruling, as follows:

“That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.”¹⁰⁸

I would highlight that the lack of enforceability in third countries on the one hand and the close connection, even a possible joint responsibility, between the transferor and transferee may lead to a search for guidance in cases like *Centros*. Its labour law angle is that the case deals with share capital of a company that is meant to protect both public and private creditors of the company. Employees are also in the potential position of private creditors with their pecuniary claims on severance payments, notice payments, compensations for information and consultation infringements etc. However, I close cases of type (ii) with these short remarks.

3.3. Type (i), Intra-Community (EC/EEA) Transfers

The effects of transfers under type (i) are complicated. I will consider it from a strictly legal angle and omit any references to any practices and policies e.g. in inducing investments. The cases may also be rather complicated. They might involve a European Company (*Societas Europaea* (SE)) but I will not consider this feature at present. Equally, they might include collective agreements of variable categories. They might also include the joint consideration of the Collective Redundancy Directive and the Transfer Directive. There might be European Works Councils (EWC) involved or labour-intensive temporary agencies.

¹⁰⁸ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, judgment by the full Court, [1999] ECR I-1459. The judgment created a vivid debate on theories concerning the company law applicable; see e.g. the papers for a Symposium on “The Centros Decision of the European Court of Justice and Its Consequences”, April 28-29, 2000, King's College, London. In judgment C-167/01 *Inspire Art Ltd* [2003] ECR I-1155, the full Court 30.9.2003 again confirmed that freedom of establishment was justified to invoke, ‘*save where the existence of an abuse is established on a case-by-case basis*’; see the end of the second ruling.

I shall add one structural aspect under my type (i). Namely, in practice mergers may imply a concentration covering more than two Member States but ‘collecting’ the workers and employees by a cross-cross-cross-border transfer into one (or two or three) Member State(s). This can happen in the modern world e.g. when some expert removes immediately following a removal of IPRs (like a watch dog lawyer). Is it a part of a ‘business’ transferred?

The transferor and transferee are not entitled to dismiss by virtue of the transfer. However, an important issue is whether both the transferor and transferee are, in the cross-border context, entitled to resort to Article 4(1), second sentence, hence to the proviso:

‘This provision shall not stand in the way of dismissals that may take place for *economic*, technical or organisational reasons entailing changes in the workforce.’ (italics by JH)

The wording seems to imply that each of them could dismiss workers for ETO reasons in the same way that they could reduce any other expense of operation. In this context I recall that judgment *Dethier*¹⁰⁹ recognised the use of ETO dismissals for both parties. I note two types of problems.

First, this proviso also applies ‘economic’ as a notion under this ‘undertaking’ in a cross-border move. I maintain that it also raises a question about the meaning of economic in this *cross-border* context. I refer to the distinction made by *Pélissier* between *qualitatively* economic (‘cause économique *qualificative*’) and *justificatively* economic (‘cause économique *justificative*’) dismissal reasons.¹¹⁰ The former means to qualify the dismissal, to rank it in the category of ‘dismissal by economic reasons’ and to apply consequently all the rules adhering to dismissals for economic reasons: procedure, priority in re-engagement, right to retraining. It differs from a justificative reason if it is analysed as a simple causal mark without any research on its exactitude or reliability. On the contrary, the *justificatively* economic reason allows the court to determine whether the dismissal is justified, i.e. compatible with the law.¹¹¹ It also requires a double causal link to be established so as to justify a dismissal: (i) between abolition or modification of jobs and the dismissal, as well as (ii) between the abolition and modification of jobs and the economic difficulties of a company.¹¹² It also implies an in-depth study of whether the grounds invoked by the employer are of a real and serious character (‘caractère réel et sérieux’). Hence, while the wording of Article 4(1) seems to imply ambiguously that the employer has rather free hands, at least the French doctrine (and jurisdiction, says *Pélissier*) guides one to read the provision as ‘justificatively economic’. The French and German expressions seem to lead to the same conclusion: ‘changements sur le plan de l’emploi’ and ‘Gründen, die Änderungen im Bereich der Beschäftigung mit sich bringen.’ It remains to see what was meant by travaux préparatoires.

¹⁰⁹ See footnote 82, *supra*.

¹¹⁰ Also referred to by Gérard Lyon-Caen; see *Droit social*, mai 1995, p. 490.

¹¹¹ Jean Pélissier, *Chronique*, La cause économique du licenciement, *Revue de Jurisprudence Sociale*, 8-9/92, p. 527.

¹¹² *Ibid*, p. 531.

The Commission's proposal of 1975 denotes in its draft Article 6(1) that 'A transferor or transferee may dismiss employees on the occasion of a transfer...only for pressing business reasons.' The explanatory memorandum states that 'economic common sense' dictated this. This was said to be of importance e.g. in relation to a transfer to be carried out 'to restore health to economically weak undertakings.' Dismissals 'may even prove unavoidable.' Further on, any definition of 'pressing business reason' was left for the Member States, but, along with the purpose of the Directive, '...reliance on pressing business reasons to carry out dismissals is possible only if all possible solutions within the undertakings such as transfers to another acceptable job, measures for readjustment and retraining have first been exhausted.'¹¹³ This clearly means that the Directive did not mean to give a free hand for dismissals but entrenched itself behind the justificatively economic reasons. However, the rationale for the provision, which corresponds to the present Article 4(1) TD without spelling out the 'pressing business reasons' but only ETO reasons, was to enact a 'uniform' provision to cover the situation where some Member States accepted dismissals due to the transfer and some did not. As confusing as this may be, I see that the purpose was *Pélissier's justificatively* economic. This explanation is also in line with the protective purpose of the Directive in relation to which dismissing with ETO reasons obviously was intended to be an exception liable to a narrow interpretation.

Second, judgment *Dethier* is there, stating that the transferor is entitled to make ETO dismissals. It merits a deeper insight.

3.3.1. Case *Dethier*; Further Basic Questions

I will pass over the issue whether the (groups of) companies really diminish their manpower so as to get a better price from the transferee. However, at least in the context of a cross-border merger the parties may address each other with demands and agreements as to the level of manpower in a forthcoming *joint* undertaking. In such a case both are *de facto* in a position of transferor and transferee, at least if such a merger is viewed on the basis of the transfer as a whole! With this I mean that, in such a context, at a level of a subsidiary a simple closing down of a factory may take place, by transferring or even breaking up the machines etc., without any formal *transfer agreement* concerning *that* factory. This might justify maintaining that *Dethier* is not enough to settle at least cross-border mergers, if not at all the cross-border cases. On the other hand, *Dethier* – in the second sentence of its second ruling - operates with '...employees unlawfully dismissed by the transferor *shortly before*...' the transfer. The issue is that this time factor obviously has to be reassessed at least for larger corporate restructuring operations. They may take up to a year within a complex of agreements at least allegedly falling under the Directive. A further relevant aspect is that such a complex cross-border (European) merger may depend on the approval of the Commission under the Merger Regulation No 137/2004. Besides, the approval may be conditioned and further affect the time factor.

But the *definition of a transfer* also looks inaccurate in this kind of a (corporate) merger context where a joint venture is established. The definition (in Article 1(1)(b)) now operates with the notion of 'an economic entity *which retains its identity*,

¹¹³ See p. 9 of the explanatory memorandum in document COM (75) 429 final.

meaning an organised grouping of resources' (italics by JH). E.g. a daughter company located in Member State A can be transformed into a reseller and its manufacturing activities be relocated into Member State B. There they can be transferred to one, two or more factories ¹¹⁴ kept within a joint venture. Some parts of the production concerned in the new joint venture may be sold out as a part of the business plan. In a nutshell, the manufacturing activities can be *absorbed* to new entities abroad. My thesis is that the definition in Article 1(1)(b) does not cover this kind of absorption appropriately.

As such, the crucial paragraphs 36 and 37 of *Dethier* read, as follows:

36 Accordingly, inasmuch as Article 4(1) precludes dismissals from taking place solely by reason of the transfer, it does not restrict the power of the transferor any more than that of the transferee to effect dismissals for the reasons which it allows.

37 The answer to the first part of the second question referred for a preliminary ruling must therefore be that, on a proper construction of Article 4(1) of the Directive, both the transferor and the transferee may dismiss employees for economic, technical or organisational reasons.

A natural preliminary remark is that *Dethier* was delivered in 1998 on the traditional path of case law. In addition, a small Chamber delivered it, obviously not encountering any elementary cross-border questions that needed to be answered. Anyway, it includes, in paragraph 36, the idea that Article 4(1) does not restrict the transferor *any more* than the transferee. This might become important in a situation where the dismissal protection is not equal in the Member States concerned. One might thus defend an interpretation that a restriction imposed on the transferee could be enlarged to also cover the transferor. A strong argument against the transferor dismissing for ETO reasons is the fact that dismissing for those reasons implies a stock-taking on the future need of manpower, which, at least outside winding-up and liquidation cases, is by definition a task or obligation of the transferee. In joint ventures they act together, of course. To say more would require a complete CILFIT-test to be done on Article 4(1), second sentence. Besides, also this *Dethier* context may imply collective agreements via manpower clauses as in the case of several German multinational groups in 2004 (Volkswagen, Siemens etc.). This means that the notion of a collective agreement becomes this way, too, exposed to a CILFIT and Albany test ¹¹⁵ in this new cross-border context.

There is also a link to the debate launched by *Gérard Lyon-Caen* on potentially looser requirements for multinational companies. ¹¹⁶ It seems, however, that it is not feasible to set up in a consistent manner a separate threshold for multinational companies because it would just create a new battlefield concerning the contents of *such a notion*. If *Dethier* is to be reconsidered in the cross-border context, it seems that only the cross-border effect itself may serve as a yardstick. Another issue is that obviously

¹¹⁴ Besides, such relocation can be done – in a highly sophisticated production - in a relay stile, meaning that the production flow is not interrupted.

¹¹⁵ See especially paragraph 60 of Albany that declares the interpretation principle of an effective and consistent interpretation of the provisions of the Treaty as a whole. On this, see Chapter II, Section 2.6, *infra*.

¹¹⁶ See section 2.1, p. 15, *supra*.

a merger (where the employer changes) as such would be a possible yardstick, while one has to see that a European merger does not necessarily mean realising a formal merger at national level concerning every entity covered. However, I take the liberty to assume regarding this issue that today the Chamber would refer a cross-border case to a plenum.

3.4. Applicable Law

It seems appropriate to reason by following the traditional path of evolution in cases without doubt within the Transfer Directive, evolution as *de facto* dominated by the Court. In so doing the applicable law etc. consequences for the workers, *sensu lato*, of the transfer are natural ones; the pension rights may cause, as to applicable law, perhaps a problem *sui generis* when the cross-border aspect is added. I do not claim it is at the end of the day so it is one classical issue to be put under this cross-border test called ‘Amalgamated TD International’ (ATDI). However, I will set aside the Rome Convention on applicable law, as well the relevant case law.¹¹⁷ A strong presumption is that *lex loci laboris* prevails. On that basis, I will try to present some case-related aspects.

Following the traditional path of interpreting the Transfer Directive, the applicable law would obviously change with the transfer itself although the Directive is silent on this point. This could mean e.g. in the case of workers transferred from Finland to Germany that they logically come under the German dismissal rules. The special regulation in Germany of course is § BGB 613a, with an individual *Klagerecht* (right to complaint and oppose, at least in theory, a transfer), often leading to individual agreements with high severance payments. But does enjoying such a right require that the worker or employee really use his *right* to remove? While it is his right, it is difficult to reason that it would turn out to be also his obligation by an EC law provision that is meant to *protect* him! This is of practical importance e.g. in a case where the restructuring implies a cross-border transfer of type (i) but the works in practice still continue for quite a time in a plant to be transferred (closing down, continuing for a time the customers’ order etc.) The question is whether the *lex loci laboris* really changes if the workers do not remove in practice as most often happens. At least if they claim to be removed but are dismissed by the transferor shortly before the transfer, it might be justified to give them the possibility of invoking the law binding the transferee.

One could also consider a transfer the other way round, i.e. imagining relocating a factory from Germany to Finland. The background is that dismissal protection is in Germany essentially stronger than in Finland, although the German system relies a lot on practical agreements and a well established practice, courts included. However, what would then be the implications for those Germans removing, and for those not doing so? For Germans removing, the traditional logic of the Directive seems to change the law applicable immediately, always, of course, subject to Article 3(3) as to

¹¹⁷ Malmberg refers – at employees removing along the transfer - to cases C-383/95 *Rutten*, [1997] ECR I-57, paragraph 18; C-125/92 *Mulox*, [1993] ECR I-4075; and C-37/00 *Weber*, [2002] ECR I-2013, paragraphs 53 and 54.

terms and conditions in the collective agreement concerned. I will put 3(3) aside now. Anyway, the traditional broad line might be for Germans removing to Finland that they immediately end up under Finnish dismissal rules which, as to severance pay in law, include nothing (and the practice is quite fragmentary).¹¹⁸ What happens to those remaining in Germany? Does the law applicable to them change immediately by the transfer? I recall that so far the case law, contestable as such in this new framework, recognises the right of the transferor to resort to ETO dismissals. There are of course strong reasons to claim that for all of those remaining in their country, whether continuing some close-down works or not, the law applicable does not change, the reason being that they do not remove; they keep their locus. But there should be also at least a safety valve in the interpretation of *the rights and obligations transferred* meaning that the employees remove with their statutory dismissal protection if it is higher than in the receiving Member State. A further justification for this might be in Article 4(2) TD that confirms how, in cases with a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the employment relationship.

A further source for legal exercises under applicable law comes from the optional joint liability under Article 3(1). This, too, inevitably leads one to look at the implementation of Directives 77/187, 98/50 and 01/23.

3.5. Concluding Remarks

If I try to conclude the approach that seems necessary, it might require some further preliminary remarks. First, the Transfer Directive's evolutionary path is something we cannot change. Deriving from this, the classical Transfer Directive analysis should be continued in this new framework of Amalgamated TD International (ATDI). There are many further questions. What are finally the rights and obligations to be transferred? What happens e.g. to the right to strike in this context, which is enshrined in and would get its constitutional guarantee in the Treaty establishing a Constitution for EU?

But I still feel that this 'classical TD path' in a new framework is not enough. An effective and consistent interpretation of the provisions of the Treaty as a whole requires more. It strongly implies a social dimension, even at the level of fundamental rights, in a cross-border context, in relation to the fundamental economic freedoms. Amalgamated TD International requires one to think from a new perspective even concerning some fundamental notions applicable to the Internal Market, like 'undertaking' (or business, part of business etc.). There is no definition in the Treaty for an undertaking, and the problem continues in the Directive. A joint reconsideration of 'economic' is a must when reading Article 4 TD in this new ATDI framework. In so doing I dare to recommend as a tool the distinction made by *Pélissier* (by some others, too, in other countries¹¹⁹) with *qualitatively* economic (*économique qualitative*) and *justificatively* economic (*économique justificative*). Furthermore, given the example of labour-intensive companies, it seems necessary

¹¹⁸ Anticipating counter-arguments I denote that periods of notice are not essentially longer in Finland than in Germany.

¹¹⁹ In this sense, see the publication in footnote 58, *supra*.

even to think about the relationship between the Transfer Directive and posting of workers within the framework of free provision of services. A particular source of problems may lie in the draft Directive on the Provision of Services.¹²⁰ What is the difference between a TD transfer and a case in which workers are posted to another Member State, formally temporarily but in practice on a permanent basis? Another pinpoint means that a labour-intensive company is subject to a cross-border transfer; consider the effect of putting e.g. the German special protection afforded by § BGB 613a into this context; is there a risk that the protective effect of ATDI would be undermined by quasi-postings? Finally I recall the lot of collective agreements, right to strike and EWCs in this context. Research is needed, indeed, bearing in mind how corporate cross-border transfers may imply a large economic interest but the multinational groups of companies must be subject to substantially the same rules as SMEs.

4. Closing the Historical Circle

As shown above, the essential contents, both the merits and the deficiencies, of the Collective Redundancy and Transfer of Undertakings (Acquired Rights) Directive do stem from and rely on the Single Market context of the 1970s. The Single European Act itself did not change a comma in their wordings. On the other hand, the market philosophy introduced corporate responsibility in information, consultation and negotiation with a view to reach an agreement with employees' representatives, first in 1992 in the Redundancy Directive and then in 1998 in the Transfer Directive. An essential purpose was to fill a legal loophole regarding the *cross-border* corporate responsibility of appropriate procedure,¹²¹ however, without establishing a direct possibility of launching law suits against a controlling undertaking abroad.¹²² A fact is that these amendments did not create any cross-border debate on the substantive provisions of these directives. These amendments were (and still are) based on the 1989 Community Charter of Fundamental Rights of Workers, referred to by the respective Preambles.

The Maastricht Social Policy Agreement had only an indirect influence on these directives, notably by giving the legal basis for the EWC Directive. The Treaty of Amsterdam enshrined the new Social Chapter in the Treaty by incorporating the Maastricht Agreement. The Nice Treaty only gave rise to the tiny possibility of enacting on dismissals by qualified majority, requiring a prior unanimous decision on the procedure (Article 137(3) EC, last sentence). Article 136 EC incorporated the old Article 117 E(E)C. In this sense, it is somewhat surprising that the Transfer Directive, as codified by the Directive 01/23/EC, thus under the Treaty of Amsterdam, no longer refers to social upwards harmonisation, as the original Directive of 1977 did in its Preamble's last 'whereas', as follows:

¹²⁰ See COM (2004) 2. As to its implications to employment issues, see a memorandum of Professor Niklas Bruun on the public hearing of the European Parliament 11.11.2004; www.europarl.eu.int.

¹²¹ See the Commission's Action Programme of 1989, as quoted by Bercusson 1996, p. 230.

¹²² See the Commission's Explanatory Memorandum, as quoted *ibid.*, p. 232.

‘Whereas it is therefore necessary to promote the approximation of laws in this field while maintaining the improvement described in Article 117 of the Treaty,’

However, this link to upward harmonisation obviously is within reach by relying on the Treaty as a whole. But literally, the Transfer Directive is now without its formal tie to the Social Chapter. In this sense one might maintain that the Transfer Directive is now even more than before exposed to the market philosophy while it is substantively essentially stronger than the Collective Redundancy Directive. The paradox is that the latter, as codified by directive 98/59/EC still includes this tie to the Social Chapter, as follows:

‘(7) Whereas this approximation must therefore be promoted while the improvement is being maintained within the meaning of Article 117 of the Treaty,’

It is not my purpose to exaggerate the significance of these differences and this paradox; they rather might reveal something about the legislative process under the flag of Social Europe! I shall not expose them to a ‘what, when and why’ test in this paper. However, the letter of the EU Constitution would not change the position and legal landscape regarding these directives. It is another story completely what an effective and consistent interpretation of the Constitution might be one day. In the meantime, it is fair to point out that the Collective Redundancy Directive is blighted by essential shortcomings while the Transfer of Undertakings (Acquired Rights) Directive is obviously the strongest and most penetrating element in the legal structure that we already partially may call European Labour Law.

Chapter II:

1. Social and Economic in EC Law; Pyramid (Hierarchy) Thinking

In his essay *Converse Pyramids and the EU Social Constitution*¹²³ Professor Barry Fitzpatrick has made a remarkable effort to conceptualise the status of *social* law in the EU's legal order. It was written just before the adoption of the EU Charter of Fundamental Rights in 2000. It is worth discussing because it represents a way of thinking about the EU from many angles. It is not, however, easy going; his 21 pages come with 142 footnotes.

These converse pyramids need to be read as a time-related product of thinking, and, in the end, *Fitzpatrick*, after having reasoned especially on gender equality, addresses first the (even 'revolutionary') possibilities included in Article 13 EC. Second, he hints that the EU Charter of Fundamental Rights might alter fundamentally the focus of multi-level governance on social policy issues. 'This converse pyramid hypothesis need not be deterministic.'¹²⁴ However, the Charter did not alter the division of competences between the Community and Member States, not even as incorporated in the draft Constitutional Treaty. His pyramids reflect 'stone work' (like statues) for *acquis communautaire* for the period from Rome 1957 to (post-)Amsterdam 1997. I will take the liberty to present and analyse this pyramid thinking, first without referring to arguments now present in the EU Charter of Fundamental Rights and draft Constitutional Treaty.

1.1. Presenting Pyramid Thinking

Pyramid thinking is based upon the dominance of the integrative interplay between national and Community competence, Member States striving to retain competence over areas central to the their own national hierarchies (or pyramids) of values. Without denying theories of multi-level governance within the EU, Fitzpatrick holds that the competences, as these "limited fields" have expanded, partly by use of Article 308 EC but primarily through Treaty amendments, can be presented as a straightforward spectrum, as follows:

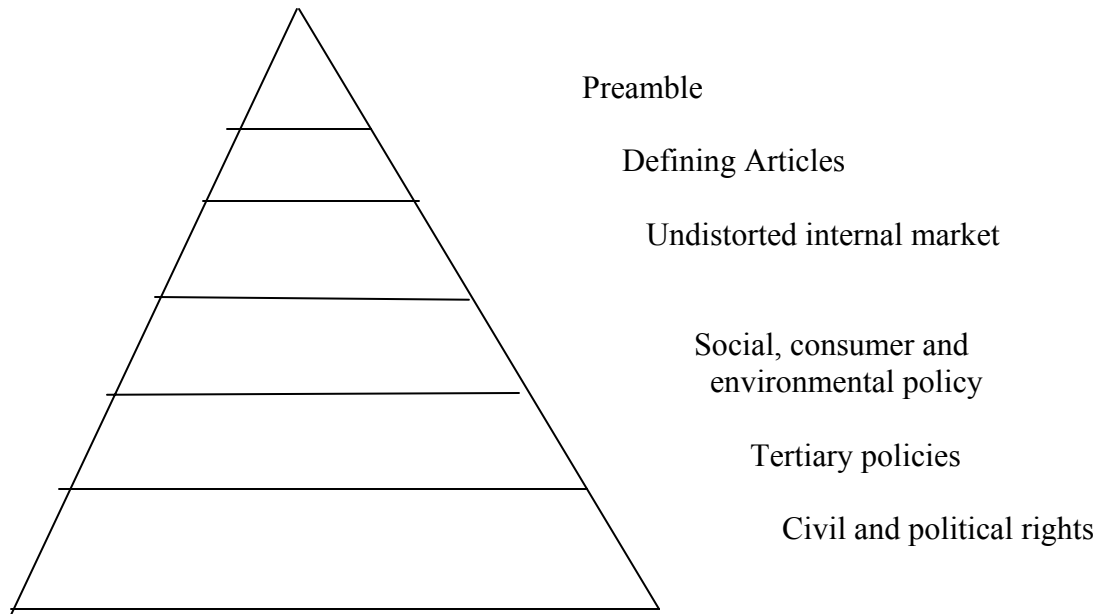
"a continuum between pure intergovernmental politics at the one end of the spectrum and supranational politics at the other ... It is therefore perfectly possible for different areas of Community policy to be located at different points along the spectrum".¹²⁵

¹²³ In Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, p. 303-324. (Fitzpatrick 2000).

¹²⁴ *Ibid.*, p. 324.

¹²⁵ Fitzpatrick refers to P Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, in P Craig and G De Búrca (eds.), *The Evolution of EU Law* (Oxford, University Press, 1999), 1-54, at 16-23. On behalf of Paul Craig I can just regret that Fitzpatrick manages to hint that it would really be Craig who has come up with the mathematics concerned. In reality they were political scientists A. Stone Sweet and W. Sandholtz. They had written 'European

In pyramid thinking this spectrum is essentially hierarchical, which Fitzpatrick then epitomises as a pyramidal structure of the EC Treaty:



EC Treaty
(Fitzpatrick 2000, p. 305)

As to the apex (the Preamble), *Fitzpatrick* notes the laudable aspirations such as “an ever closer union among the peoples of Europe”, and most notably for social lawyers, “the essential objective of their efforts the constant improvement of the living and working conditions of their peoples”.¹²⁶ Further on, he notes how the European Court has “on numerous occasions” treated this originally obviously “stratospheric” Preamble “as an overarching set of defining Community aspirations.”¹²⁷ He then refers to the *economic* aspirations of “steady expansion”, “balanced trade and fair competition” and “unity of their economies” “with the sound of which the social objectives resonate”.¹²⁸ This finally and still reflects, “despite a change in nomenclature, an overwhelmingly economic Treaty and hence a hierarchy of norms within which economic objectives take priority.”¹²⁹

Integration and Supranational Governance’ in (1997) 4 *JEPP* to which Craig refers to. It would, therefore, be even justified to nickname this spectrum as a ‘Fitzpatrick constant’. Craig well presents on the spot concerned the thinking within political science BUT he does not, of course not, try to smuggle this kind of mathematics into a constitutional reasoning on European *law*.

¹²⁶ First and third recitals of the Preamble.

¹²⁷ Fitzpatrick refers at this point only to case 43/75 *Defrenne v. Sabena* [1976] ECR 455, where, in para. 10, the Court invoked the third recital ‘to justify the social objective’ of Article 141 [ex 119] EC. Fitzpatrick (2000), p. 305, footnote 13.

¹²⁸ Fourth and fifth recitals of the Preamble.

¹²⁹ Fitzpatrick (2000), p. 306.

For me, this is the core of rigid pyramid thinking in the EU context. Economic leads the tango, social tries to follow. We'll see.

In the 'defining' or 'opening' Articles (2 and 3) of the EC Treaty *Fitzpatrick* includes the minor amendments of Maastricht and Amsterdam,¹³⁰ followed by the enshrining of European citizenship (Articles 17-22 EC) and the new Treaty base for legislation against discrimination in Article 13 EC. These developments reflected, no doubt, 'at least a cosmetic shift of emphasis away from a purely economic pyramid but without altering the economic focus of these "apex Articles"'.¹³¹

Further on in the European economic constitution, the top substantive layer, logically, concerns the creation of an undistorted internal market. The *fundamental* market freedoms are followed by essential ancillary policies such as agricultural and transport policy, and nowadays by the EMU, vital to the ultimate achievement of an undistorted internal market. Only after these core principles have been stated is attention 'diverted' to 'secondary, "middle layer" issues such as social policy. The ambivalence of the EU towards social policy is highlighted by the absence, until Amsterdam, of an effective Treaty base for a broad social legislation that could be enacted by qualified majority voting (QMV). Further on, the negative integration effects triggered (often referred to as "spill-over") environmental and consumer policy. They are both now striving for positive integrationist standards.

As to social policy in the middle layer of the hierarchy, it belongs there because it was originally included in the Treaty. Despite this and the 'more extensive Treaty bases now available', Community social legislation seems to have been rarely (underlining here) motivated by internal market spill-over.' Exclusion of the rights and interests of employed persons from QMV under Article 95 EC contributed to this lack of "spill-over". Finally, internal market issues retain the potential to create such spill-over controversies in the future, as evidence of which *Fitzpatrick* refers to case *Albany*, a 'clash between competition policy and the right to free collective bargaining'.¹³²

¹³⁰ Maastricht added 'high level of employment and of social protection' in Article 2 EC. Amsterdam refined these further, in adding 'equality between men and women, ... [and] a high degree of competitiveness and convergence of economic performance.'

¹³¹ *Fitzpatrick* (2000), p. 306.

¹³² *Fitzpatrick* (2000), p. 307. *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* is case C-67/96 [1999] ECR I-5751, judgement of the Court in plenum of 21.9.1999. As to the judgment in general, see Bruun and Hellsten (eds.), *Collective Agreements and Competition Law in the EU*, DJØF 2001 (Bruun and Hellsten). *Albany* and its sister cases *Brentjens*, C-115-117/97, and *Drijvende Bokken*, C-218/97, dealt with a single sectoral pension fund - each running a supplementary occupational pension scheme established by a sectoral collective agreement that had been declared binding *erga omnes*. This meant that every worker in the three sectors concerned had to be affiliated to the sector's fund unless the fund itself granted an exemption. The companies concerned wanted to dispense with the compulsory affiliation by arranging, according to them, similar or better pension benefits for a lower price outside the fund. They invoked the EC competition rules (Article 81 [ex 85] EC).

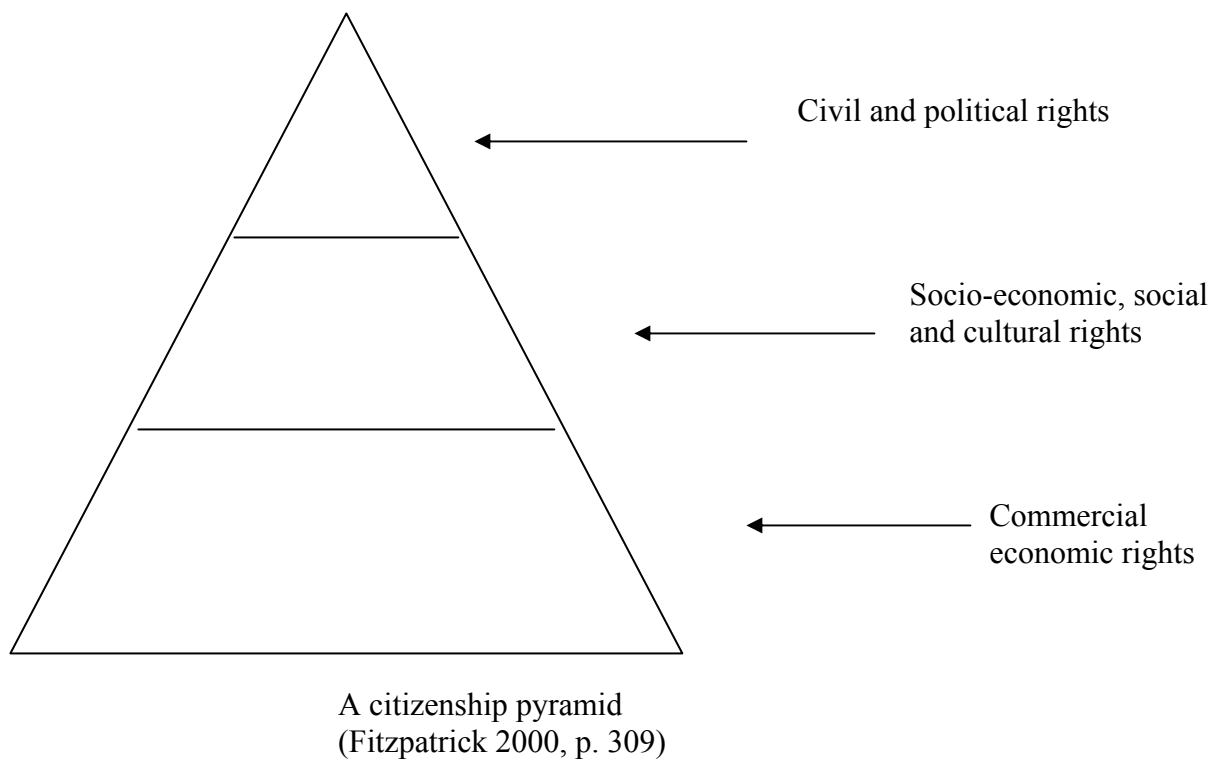
Tertiary policies (economic and social cohesion, R&D, education, vocational training and youth), falling largely out of any harmonisation, have not challenged the economic core of the pyramid itself. Regarding civil and political rights Fitzpatrick refers to the UN Covenants that do not include any commercial rights.

Finally, *Fitzpatrick* recounts the well-known deficiencies in civil and political rights while recognising the progress made. However, his conclusion is that

‘...only in the “top level” of the EU pyramid, within the scope of the internal market, [...] the EU legal system achieves a level of comprehensiveness and coherence which justifies the designation of “constitution”. Since the earliest days of the European Court, it is this economic pyramid, a European economic constitution, which takes precedence over a subsequent, inconsistent national law.’¹³³

1.1.1 A Politico-Socio-Economic / Citizenship Pyramid

As a theoretical but simultaneously traditional example of a constitution *Fitzpatrick* presents a ‘citizenship pyramid’ that is the converse of the EU structure:



¹³³ Idem, p. 309.

With the citizenship pyramid as a mirror, *Fitzpatrick* maintains that ‘Both within a grand sweep through the EC Treaty, and but also within the minutiae of it, the EU’s economic pyramid [i.e. EC Treaty pyramid] is almost precisely the *converse* of ... a “traditional” constitutional structure.’¹³⁴ However, *Fitzpatrick* sees social rights as a sandwich both in the middle of the Community pyramid and also in the interaction between these converse pyramids. Then comes the clue:

‘Despite some occasional willingness to use safety valves to protect significant national pyramidal values, “middle layer” areas of competence are intrinsically vulnerable to apparently superior EU economic values. Therefore social law values have to fight their way on to an internal market agenda, for example, in the recent conflict between competition policy and the right to free collective bargaining.’¹³⁵ (emphasis JH)

The citation describes the deeds of the European Court of Justice. Within EC secondary legislation *Fitzpatrick* does not present such valves.

1.1.2 The EU Social Pyramid

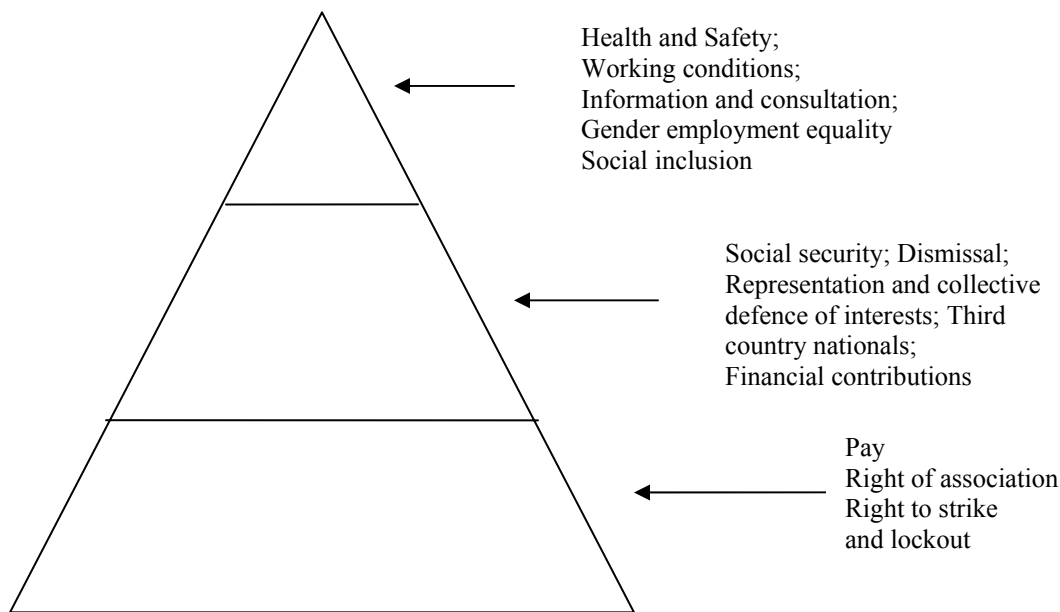
As possible for every area of Community policy,¹³⁶ *Fitzpatrick* constructs the EU social pyramid, based upon the degree of EU competence:¹³⁷

¹³⁴ *Fitzpatrick* (2000) p. 310; underlining added. I remind that there is no constitution in UK, drilling, that too, a visible hole into the pyramid thinking.

¹³⁵ *Ibid.*, p. 313. Underlining added. As to the conflict, *Fitzpatrick* refers – in a footnote - to case *Albany*, C-67/96.

¹³⁶ *Fitzpatrick* also presents conversed pyramids on sex equality. I leave them aside now.

¹³⁷ *Ibid.*, p. 315.



The EU social pyramid
(Fitzpatrick 2000, p. 315)

Fitzpatrick asserts, what is certainly appropriate, that in a genuine social constitution freedom of association would top a social pyramid, followed by protection for other core aspects of collective labour law, for example the right to strike that is excluded from the Social Chapter of the Treaty. Social security and dismissals would also be high up there. It is possible to view the 1989 Community Charter of Fundamental Rights as an attempt to convert the pyramids but it includes flaws, is subject to subsidiarity and its potential as a source of law is limited by its uncertain status.¹³⁸ Anyway, *Fitzpatrick* recognises that some potential exists, next to the then draft EU Charter of fundamental Rights and social dialogue¹³⁹, in Articles 136-145 EC irrespective of market integration, while neither a

¹³⁸ Ibid, p. 315-6. Concerning the Charter's uncertain status *Fitzpatrick* refers to Advocate General Jacobs' opinion in *Albany*. I recall that the judgement did not follow – especially as to its grounds – the Opinion and the weaknesses counted by *Fitzpatrick* (and Jacobs). See *infra*.

¹³⁹ Ability of Social Dialogue to provide the momentum towards an EU social constitution *Fitzpatrick* calls as an under-developed aspect in his essay. Anyway, he holds the prospect brought by Social Dialogue as 'not sustained by its output since its inception'. Ibid, p. 323, footnote 134. *Fitzpatrick* refers to Brian Bercusson, "The European Community's Charter of Fundamental Social Rights of Workers", (1990) 53 MLR 624 at 641. This point of reference is simply too old. Bercusson at the latest in his 'European Labour Law' in 1996 presented social dialogue as a real prospect, and, besides, was able to refer to the very first European Framework

recognisable hierarchy of fundamental social rights nor a consistent and coherent system of social law has emerged from this process.

2. Criticizing Pyramid Thinking in General

The broad outline of pyramid thinking includes sound perceptions. The EU's social and labour law is generally still market-orientated, fragmented and thin as to collective rights. How much the Constitutional Treaty would change, is another story. However, this thinking or 'model' is liable to severe criticism, as well. Some graves and treasures remain undetected both deep in the EU pyramid and even on its face.

A meta-problem is that this conversed pyramid thinking is built upon the use of national legal orders not just as mirrors but even as building blocks of the EC pyramid – even up to *minutiae*, as Fitzpatrick puts it. It is not my contention that the EC/EU could be separated from its constituent Member States. It is a multi-layer system of governance. However, I would highlight that the EC/EU essentially is what the Member States have done *together* – without that being *a priori* the opposite (converse) to the national legal orders. Hence, more adequate than the *converse* pyramids as the flag of EC law, it seems to be taking the EC/EU as a *unique legal order*.¹⁴⁰ Paradigmatically, its own pyramid should be construed and assessed with this assertion as a basis, not its relation to any other legal order (creature). This unique legal order the President of European Court of Justice 1994-2003, Professor *Gil Carlos Rodríguez Iglesias* has described, as follows:

“So what really distinguishes the European Community from other international organisations is the extent and above all the intensity of the powers which the Treaties have conferred upon it. Thus the Treaty powers include wide legislative, executive and judicial powers in fields traditionally reserved as sovereign to the State, being within its exclusive jurisdiction.”¹⁴¹

Agreement on Parental Leave, reached on 7 November 1995, see pp. 501-570, especially the conclusion on pp. 569-70.

¹⁴⁰ I rhetorically recall case 26/62 *Van Gend and Loos* [1963] ECR 1, case 6/64 *Costa v. ENEL* [1964] ECR 614 and the Court's Opinion 1/91, [1991] ECR I-6079, on the draft EEA Agreement. In the last mentioned the Court declared (as summarised in CELEX): '[...] the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.' Outside the Court one may, of course, add the prominent role of the Court itself to the essential characteristics of this new legal order.

¹⁴¹ See 'The European Legal Order from a Constitutional Perspective'; lecture, Copenhagen, 26.4.1999.

I support this assertion and note that the intensity of powers already gives rise to doubt about an overarching existence of converse pyramids, thus a couple of pyramids. There might be legal features with only one pyramid left.

A related problem is that the hierarchical nature of the EU's (economically dominated) pyramid is, in the converse pyramid thinking, rather directly derived from the (so far) division of competences between the Community and the Member States, as well as from the neo-functionalist integration theory followed by establishing (only) the European *Economic* Community. First, how come, if the pyramid theory was correct up to its apex, that for 51 years there was the European Coal and Steel Community with an essentially more social focus (policy) and competences than in the EC/EU? Second, while the ECSC, too, resulted from a market driven neo-functionalist integration (theory), the Commission of the ECSC was even competent to adopt recommendations (corresponding directives in the EEC) on minimum wages (Article 68 ECSC). What would have been the place of such (recommendations) directives in the EC pyramid? This special competence was, of course, deeply market-bound but it would have worked, if ever used, also in protecting the workers concerned. Anyway, my thesis is that (limited) competence does not as such determine the nature of the action very straightforwardly.

A third paradigmatic remark is that while construing pyramids (i.e. conceptualizing EC law) is meaningful as such, it easily leads one to lose sight of the evolutionary nature of EC law, up to the leading Articles of the Treaty, as we will see below. I rhetorically recall the lesson given by the Court in *CILFIT*. Next to linguistic diversity, legal concepts may have different meanings at national and Community level, and, most important now, 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied'.¹⁴²

A structural remark is that for unknown reasons *Fitzpatrick* does not count the enshrinement of 'policy in the social sphere' in Article 3(i) [now 3(j)] EC by the Maastricht Treaty while he clearly uses the expression 'opening Articles', hence, also covering Article 3. We'll find Article 3(j) EC later in case *Albany*. Equally, what *Fitzpatrick* doesn't express is Article 4(1) (ex 3a(1)) EC, inserted by Article G(4) TEU, that refers to common economic policy, internal market and, important here, to the principle of an open market economy with free competition. In any case it seems natural that the dominance of economic would rely on market economy. Anyway, I leave it open whether Article 4 EC belongs to *Fitzpatrick's* 'leading Articles', and what its impact might be. Such court case doesn't exist that I know.

While *Fitzpatrick* raises the evidential force of the converse pyramids up to *minutiae*,¹⁴³ criticism also on the same line has its place.

¹⁴² Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 20. As to *CILFIT* in relation to *Albany*, see footnote 187, *infra*.

¹⁴³ *Ibid*, p. 310. As a broader source of criticism I refer to the analysis of Miguel Poiares Maduro, 'We the Court. The European Court of Justice and the European Economic Constitution'. Oxford,

2.1. EU's Social Pyramid

Some structural remarks preliminarily have their place here. First, the Treaty of Nice introduced the possibility to use QMV to 'middle layer' areas – except at social security – in case that the Council takes a prior unanimous decision thereof (Article 137(2), last sentence).

A paradigmatic problem is that the division of competence at social matters between the Community and the Member States is far from clear. A more serious issue is that the 'bottom layer' areas in Fitzpatrick's pyramid, i.e. pay, right of association, right to strike and lockout, may fall under EU competence. This is especially possible if the social partners at European level conclude an agreement upon them, and the Council transforms such agreement into EU law.¹⁴⁴

The 'Fitzpatrick constant' (spectrum), leading to one point within a spectrum as describing the Community competence, is maybe the most illusory exactly at social policy. As *Kapteyn* and *van Themaat* put it, Article 3(j) EC on social policy 'offers no peg on which to hang anything about the nature of Community competence or over its scope.'¹⁴⁵ Other Treaty provisions do bring some clarity, of course, but even the European Convention noted how e.g. Article 137(5) EC does not exclusively define the community competence.¹⁴⁶ And, indeed, e.g. Part-Time Directive (97/81/EC) and Fixed-Term Directive (99/70/EC) do extend the non-discrimination principle to pay. As to e.g. freedom of association, our honourable Lord *Wedderburn* already in 1992 held that an EC law instrument thereof would be possible under Article 94 (ex 100) EC.¹⁴⁷ Further hooks invalidating the 'Fitzpatrick constant' are safety and health measures within the

Hart Publishing, 1998. Maduro distinguishes – instead of any pyramids! – three ideal constitutional models in explaining Article 28 (ex 30) EC (the cornerstone provision of the free movement of goods): the centralised, the competitive and the decentralised models. Without sticking to any of these his conclusion is to claim further constitutionalism (i.e. in addition to a formal constitution that it anyway also requires). Besides, 'European integration challenges the legal monopoly of State and the hierarchical organisation of law (in which constitutional law is conceived as the "higher law")'. Moreover, 'competition among States' and 'competition among rules' challenge the supremacy of law, subject to market competition. All these require a new constitutional legal theory. Ibid, p. 175. However, as an intermediate step Maduro has pointed out how the Maastricht Treaty stressed 'not only economic efficiency, but also social and redistributive values', calling for a broader concept of the European Economic Constitution and its relation to political values (far beyond anti-protectionism). Ibid. 160 et seq.

¹⁴⁴ In general terms about this, see Jari Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*. Labour Policy Studies No. 259. Ministry of Labour, Helsinki 2004, Finland. III + 151.

¹⁴⁵ *Kapteyn* and *VerLoren van Themaat*, *Introduction to the Law of the European Communities*, 3. ed., Kluwer Int., p.1045.

¹⁴⁶ See paras 26-28, p. 14 of the Report of WG XI. Document CONV 516/1/03, REV. 1.

¹⁴⁷ *Wedderburn* of Charlton, Lord, *Freedom of Association and Community Protection*. A Comparative Inquiry into Trade Union Rights in the Member States and into Need for Intervention at Community Level. European Commission 1992 (stencil). See paragraph 35.1.

free movement of goods and the pay-related Posting Directive under free movement of services. I explain both, *infra*. In conclusion, much more precise than the ‘Fitzpatrick constant’, seems to me to be the assertion that if the Member States may reach a qualified majority on a social matter, they are also able to find the necessary EC competence.

Fitzpatrick denotes as a challenge the need to elevate the collective rights up to the top of the pyramid. That view is easy to share. And, in any case, the Constitutional Treaty would enshrine the right of association and the right to strike. It will be difficult, if not impossible to qualify them as ‘middle layer areas’ because they will be on an equal footing with the fundamental economic freedoms. The EU Charter of Fundamental Rights is a step in that direction. It will show up in one of my test cases of pyramid thinking, namely in that of Safety of Machinery.

However, I will start with equal pay and the free provision of services because *Fitzpatrick* himself used them as his test cases.

2.2. Equal Pay

Describing the overall lot of ‘social’ in the EU, *Fitzpatrick* refers to case *Defrenne II* as indicating how ‘the Court invoked the third recital of the EC Treaty Preamble to justify the social objective of Art. 119 EC.’¹⁴⁸ To be precise, the Court first declared (para. 8) the double aim of Article 119 EC: the need to protect against distortion of competition in those Member States with advanced equal pay policy (para. 9); invoking ‘social’ in the Treaty Preamble as follows (para. 10):

‘...[Article 119] forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.’

After noting how the Treaty founders accentuated this by situating the provision concerned into ‘a Chapter devoted to social policy’, and recapping the social progress marked by Article 117 EEC (para. 11), the resumption, essential in this ‘pyramidal analysis’ came in para. 12, as follows:

‘This double aim, which is *at once economic and social*, shows that the principle of equal pay forms part of the *foundations* of the Community.’ (emphasis added)

The Court further recalled (para. 13) the proclamation to realise equal pay by the end of the first stage of the transitional period (enshrined in Article 119(1) EEC). However, the essential assessment is that the Community foundations were (and still are), at once economic and social. Besides, the social factor was granted precedence in this particular

¹⁴⁸ Ibid, p. 305, footnote 13 referring to paragraph 10 of the judgment.

case and not just as a safety valve, but following a detected non-working of an internal market spill-over or non-harmonization. Another issue is whether equal pay regulation (of the EU) is seen as a huge political ‘safety sever’ (or Cinderella in the cruel internal market) that justifies the use of the word ‘overwhelmingly’ as qualifying the economic Treaty. However, equal pay in general terms does not fit into rigid pyramid thinking (with economic supremacy) while many details within the ‘equal pay developments’ after *Defrenne II* (and *Barber*) can be qualified as reflecting the dominance of economic over social (equal pay) as *Fitzpatrick* does.¹⁴⁹

2.3. Free Provision of Services

As a means of safeguarding the pyramids, *Fitzpatrick* brings into the argument the free provision of services. His hammer is the case *Unborn Children*¹⁵⁰ in which the Court manifested the inexorable (and possibly too far-reaching) ability of the internal market law to ‘harass’ even highly cultural, religious and social areas of life; and in this case besides the enacted (in 1984) constitutional values, namely the ban on abortion, of Ireland. I agree with this harassment aspect in the pyramid thinking. However, the outcome (by the ECJ) in the case was twofold. The ECJ first concluded that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 50 of the Treaty. This illustrates the ability of ‘economic’ to cover in EC law nearly all forms of activity whatever the remuneration. However, the applicability of the internal market law in the end protected the right of the mother to get information about legal abortion abroad only if the clinics (the economic operators) concerned were involved in the distribution of the said information. The rest (ban on information on abortion by independent actors such as a student organisation) the ECJ left up to national law and thus set aside particularly the freedom of expression, guaranteed by Article 10 of the European Human Rights Convention. This was, in 1991, the Court’s backdoor method of evading any direct challenge to the (national) values concerned. An intermediate step taken by the Court was to reframe the question of the national court so that instead of a person’s right to produce information the Court assessed such an alleged right of a student association. The link between the student association and the abortion clinics the Court simply found to be ‘too tenuous’ to fall under Article (ex) 59 of the Treaty. Thus, ‘the case can be interpreted as indicating that fundamental rights of Community law offer first and foremost protection to what might be called “factors” of production, instead of individuals or non-profit student organisations.’^{28a} However, while the case illustrates very clearly the strong and

¹⁴⁹ Later in his essay, *Fitzpatrick* explains further developments within the gender equality. That is highly important as such but, however, doesn’t explain draws (like the concept of indirect discrimination) that do not fit in the rigid pyramid thinking.

¹⁵⁰ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan* [1991] ECR I-4685.

^{28a} Tuomas Ojanen, *The European Way. The Structure of National Court Obligation Under EC Law*, Gummerus Kirjapaino Oy, Saarijärvi 1998, p. 321, fn. 507. On this judgment in critical sense, also see e.g. Deirdre Curtin, *CMLRev.* 29: 585-603, 1992. In a similar case from Ireland,

often paradigmatic position of the ‘economic’ dimension in EC law, it does not prove to my mind anything regarding *employment* law.

I take the liberty to present another example within the field of free provision of services, namely the Posting of Workers Directive (96/71/EC). A straightforward application of the principle of economic dominance would mean that the host country of the posted workers would have to tolerate social dumping based on low wages. As case *Bond van Adverteerders and others v The Netherlands State* proves, *economic* aims cannot constitute grounds of public policy within the meaning of Article 46 [ex 56] of the Treaty,¹⁵¹ thus grounds to restrict the freedom of cross-border provision of services. In contrast, it is, firstly, settled case law that the Member States are entitled to extend their minimum wages (set up either in law or collective agreements) also to cover workers posted from another Member State.¹⁵² Thus, the Member States are *free* to combat economic social dumping, protecting, of course, at the same time the workers concerned. However, adopting a pyramidal way of thinking, this protection of workers, especially that of construction workers,¹⁵³ under internal market law and predominance of its economic values could perhaps be (again!) explained as just an example of a safety valve with which values high up in the national pyramids can be safeguarded. Yes or no, I will not pursue this due to the more graphic evidence brought by the Posting Directive.¹⁵⁴

The directive has had, since 16 December 1999, one crucial effect. It means that the Member States *must* for all sectors extend their law-based minimum wages to posted workers, and, for the construction sector, also wages set up in certain mainly nation-wide collective agreements.

The Preamble of the Directive noted the double need for it: ‘(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.’ Economic and social are together (cf. the double aim of equal pay in *Defrenne II*). Hence, the Directive transformed the earlier freedom of the Member States into an obligation in European law, thus an element in the EC pyramidal structure. By definition it combats an unlimited freedom to provide services and was also, by that reason, heavily opposed.¹⁵⁵ The

Open Door and Dublin Well Woman v. Ireland, The European Human Rights Court deemed that the ban on information violated the freedom of expression. Judgment of 29.10.1992, A-246A.

¹⁵¹ Case 352/85 [1988] ECR 2085, para. 34.

¹⁵² Cases 61-62/81 *Seco* [1982] ECR 223, para. 14; C-113/90 *Rush Portuguesa* [1990] ECR I-1417, para. 18; C-43/93 *Vander Elst*, [1994] ECR I-3803, para. 23; and C-369 and 376/96, *Arblade* [1999] ECR I-8753, para. 41. The Court gave the judgments in *Vander Elst* and *Arblade* by sitting in plenum.

¹⁵³ See *Arblade*, para. 36.

¹⁵⁴ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

¹⁵⁵ Examples of the ultra-liberal concept of freedom to provide services are also in the argumentation of companies in cases C-369/96 *Arblade*, C-49/98 *Finalarte*, see footnote 30, and C-164/01 *Portugaia* [2002] ECR I-787. *Mutatis mutandis* the principal contractor in case *Wolff & Müller v. Pereira*, C-60/03, judgment 12.10.2004, nyr, invoked its constitutional right to carry on

Directive does not fit in to a rigid pyramidal thinking. It is also fully in line with Article 50(3) [ex 60(3)] of the very EC Treaty that subordinates free movement of services to the same conditions that national service providers have in the host country. That provision certainly is not any safety valve but, as an incorporated and structural factor, heavily opposes any straightforward pyramidal thinking with respect to economic dominance.

2.4. Right to Strike¹⁵⁶

What about the right to strike in this context? It is expressly guaranteed in or indirectly protected by several national constitutions. In the EU it was deduced from personnel regulations and also, in *Danske Slagterier* of 1990, from the concept of a prudent businessman.¹⁵⁷ Thus, the basis was both somewhat artificial and fragile. A further point of reference, although of course not for the UK at that time, was the 1989 EU Charter of Fundamental Rights of Workers. With this thin history the Council adopted the so-called Monti-regulation in 1998.¹⁵⁸

For the purposes of this reasoning it is necessary to recall the essential contents of the draft Regulation, as published by the Commission in January 1998. Namely, it first included a somewhat vague reference to fundamental rights (Article 1). Then, notably, its draft Article 2 contained the right of the Commission to *decide* on the legality of strike action blocking the cross-border trade:

‘Where the Commission establishes the existence in a Member State of obstacles within the meaning of Article 1, it shall address a *decision* to the Member State directing it to take the necessary and proportionate measures to remove the said obstacles, within a period which it shall fix’.¹⁵⁹

If ever realised, this structure would have been a manifest example of the dominance of the economic factor (free movement of goods) over the social factor (the right to strike). But the Council finally adopted a completely different scheme: essentially an information

an occupation against its law-based liability to pay wages as a guarantor to workers of its subcontractor.

¹⁵⁶ As to right to strike in EC law, see Tonia Nowitz, *International and European Protection of the Right to Strike*, Oxford University University Press 2003, especially p. 245-263. With essentially similar line but with more detailed contents PhD Olavi Sulkunen explained the developments in protection of the right to strike in EC law in his Article (in Finnish) ‘Ammattiyhdistysoikeudet Euroopan yhteisön oikeudessa’ (Trade Union Rights in EC Law). *Työoikeudellisen yhdistyksen vuosikirja 1999-2000*, p. 55-195.

¹⁵⁷ Case C-338/89 *Danske Slagterier* [1991] ECR I-2315.

¹⁵⁸ Officially: Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States.

¹⁵⁹ OJ C10, 15.1.1998. Even the name of the draft instrument was telling: Proposal for a Council Regulation (EC) creating a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade.

structure, and respect of the national right to strike was proclaimed.¹⁶⁰ While the legal effect of the Regulation within the EC law pyramid is liable to different opinions, it in any case protects a core labour right and does not subordinate it to an economic dominance of the EC treaty pyramid à la Fitzpatrick, to an EC law proportionality test carried out by the Commission etc. A safety clause similar to that in the Monti-regulation is in the Preamble of the Posting Directive, stating that (Recital 22) ‘Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions’.

A proper test case of the right to strike in EC law obviously looms in the High Court of London. There, a Finnish ship-owner Viking seeks, in a nutshell, an injunction against ITF and the Finnish Seamen’s Union concerning any industrial action (even covering the cause of such an action) related to the planned re-flagging of MS Rosella in another Member State. The grounds are freedom to provide maritime transport services (EC Regulation 4055/86), free movement of workers (Article 39 EC) and freedom of establishment (Article 43 EC). Blueprints of both of the EU’s constitutions, economic and social, will be on the desk of the Court, most likely finally in the ECJ.

In conclusion, the Monti Regulation (read together with its *travaux préparatoires*) does not fit into rigid pyramid thinking. If it (as the preamble clause in Posting Directive) is taken as a safety valve, it is remarkable that the regulation is part of EC secondary legislation, enacted by the Council comprising the representatives of the Member States (Posting Directive enacted in co-decision by the Parliament and Council). In the ‘safety valve way of thinking’ à la *Fitzpatrick* the role of the Court comes up in a misleading way, as if it would be the only body capable of construing these safety valves in the somewhat mystical European law.

2.5. Safety of Machinery

Before outlining the pyramid problem concerning safety of machinery I recall *Fitzpatrick’s* thesis in its sharpest form: the fundamental economic freedoms of the undistorted internal market dominate over social values that are essentially national. Thus, at the level of this thesis, typically two sets of norms are present: EC norms and national norms. On the other hand, although safety and health tops *Fitzpatrick’s* EU social pyramid, it is paradigmatically subordinated to economic freedom (here free movement of goods), in his EC Treaty pyramid. But I also want to highlight that *Fitzpatrick* has not written anything at all about machinery safety in his essay. I do it so as to test whether the pyramid way of thinking is capable of describing adequately such an important legal topic.

¹⁶⁰ Article 2 of the Regulation:

This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.

However, it is not always the case that when economic and social considerations clash the economic considerations arise from the EC and the social considerations arise from national law. Both the juxtaposed economic and social considerations may arise from EC law as well. Safety of machinery is a graphic illustration of this, and here I mean the safety of workers and employees using the machines, hence not as consumers. To illustrate this, I discuss only the so-called Machinery Directive (MD). Officially it is, as last amended, Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery. Except for one example, I need to take the liberty to pass over its practical application, as well any overall assessment on its effectiveness. It is better suited to safety specialists and I will only discuss how adequately the pyramid way of thinking explains the normative structure concerned.

MD sets the rules concerning the properties of the Machines. More precisely, according to its Article 1, MD applies to machinery and lays down the essential health and safety requirements therefore, as defined in its Annex I. These requirements are compulsory (see Recital 14) and rather simple in general terms. But as a whole, the MD is a remarkable set, almost like a virgin forest of rules. The Directive and its Annexes occupy 46 pages of the Official Journal.¹⁶¹ One guide published by the Commission (DG Enterprise) is 241 pages long,¹⁶² another one 266 pages.¹⁶³ This set of rules has Article 95 (ex 100a) EC as its legal base.

Article 95(3) EC requires that in making proposals for internal market legislation the Commission, concerning health, safety, environmental protection and consumer protection, will take as a base a *high level of protection*, taking account in particular of any new development based on scientific facts. Article 95(3) EC, second subparagraph, equally requires that '[w]ithin their respective powers, the European Parliament and the Council will also seek to achieve this objective'. MD puts this into practice by stipulating in Article 2(1) how 'Member States shall take all appropriate measures to ensure that machinery or safety components covered by this Directive may be placed on the market and put into service *only if they do not endanger the health or safety of persons...*' (emphasis added). This establishes the principle of risk prevention as the leading essential requirement. Annex I elaborates this requirement and prolongs it to cover, next to normal use of a machine, also uses 'which could reasonably be expected'.¹⁶⁴

Hence, the requirement for a high level of health and safety is European law, as enacted for the internal market. The Preamble of the MD mentions the internal market twice:

¹⁶¹ OJ L207, 23.7.1998.

¹⁶² Community legislation on machinery: Comments on Directive 98/37/EC
Luxembourg: Eur-Op, 1999 - 241 p.

¹⁶³ Machinery: Useful facts in relation to Directive 98/37/EC. Luxembourg: Eur-Op, 1999 - 266

p.
¹⁶⁴ Annex I, Essential Health and Safety Requirements, point 1.1.2(c).

‘(2): Whereas the internal market consists of an area without internal frontiers within which the free movement of goods, persons, services and capital is guaranteed’;

The Preamble thereafter (Recital (5)) denotes how the Member States are responsible for ensuring the health and safety, in particular, of workers, notably in relation to the risks arising out of the *use* of machinery. The seventh Recital refers to approximation of existing national health and safety provisions ‘to ensure free movement in the market of machinery without lowering existing justified levels of protection in the Member States’. Otherwise the philosophy is to produce state-of-art machines; see Recital (14) and the essential safety requirements as specified in Annex I.¹⁶⁵

Then comes the clue as to the purpose of the MD. Although the name of the instrument operates with *approximation* of the laws of the Member States, implying some space for national rules, the ninth Recital tells us what it is all about:

‘(9) Whereas paragraphs 65 and 68 of the White Paper on the completion of the internal market, approved by the European Council in June 1985, provide for a new approach to legislative *harmonisation*; whereas, therefore, the *harmonisation* of laws in this case must be limited to those requirements necessary to satisfy the imperative and essential health and safety requirements relating to machinery; *whereas these requirements must replace the relevant national provisions because they are essential*’; (emphasis added)

Hence, the MD harmonises. Although it is limited to essential health and safety requirements, it anyway harmonises. I recall that Article 95(4) EC leaves a tiny possibility for the Member States to notify national norms they want to retain after a harmonisation measure. It requires ‘major grounds’ referred to in Article 30 (ex 36) EC. Besides, Article 95(4), second subparagraph, leaves it up to the Commission to confirm such national rules, ‘after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.’ The grasp of the Community is quite perfect, as enacted by the Member States (unanimously, by the way).¹⁶⁶

¹⁶⁵ Envisaging criticism I note how Recital (14) also refers to taking account of economic requirements in applying the essential safety requirements. This is already fine-tuning debate. It reflects e.g. a fact that a minimal or just nominal improvement in health and safety may cost enormously and is therefore not feasible. At this fine-tuning level common sense is used in every Member State, as well as in the Commission. However, this debate doesn’t invalidate the principle in Article 2(1): only safe products are allowed to the market.

¹⁶⁶ For the purposes of this writing it is not needed to verify to what extent the Member States have tried or even succeeded in keeping their national safety requirements relating to machinery. I take it granted that they are few, not known for the European labour law audience and dealing with minor issues. Otherwise there would have been cases on MD in the ECJ. Searching among case titles by ‘machinery’ gives some cases but none under MD. That I know the pending case *AGM-COS.MET* is the first one referred to the ECJ under MD. See footnote 169, *infra*.

It is essential to note that this harmonisation measure (MD) has *de jure* and *de facto* replaced, with respect to the properties of machinery, not with respect to their use, national safety requirements, although national norms are required for its implementation and the EC measure is still a directive and not a regulation. Normally the national laws just repeat the essential safety requirements of the MD and set up the necessary administration and executive surveillance rules. This structure means that only machines fulfilling the (finally rather detailed) essential safety and health requirements are allowed onto the market, even if they would never become marketed in another Member States. Put the other way round, the Member States are (save exceptionally under Article 95(4) EC) not allowed to set up even higher safety requirements – higher than ‘high level’, as to the properties of machines. That is generally possible only with respect to minimum health and safety directives based on Article 137 (ex 118a) EC; see the ‘Use Directive’.¹⁶⁷ In MD, Article 2(2) discerningly notes the Member States’ possibility to lay down provisions for the *use* of machines, ‘provided that this does not mean that the machinery or safety components are modified in a way not specified in the Directive’.

However, and now finally comes the pyramid context: high level of health and safety of workers (the social factor) is a precondition for enjoying the fundamental economic freedom of a product (machinery) to be marketed both nationally and across borders. There is no longer any ‘typical’ converse pyramid structure of norms but only one single pyramid. Social and economic are so much tied up that it is not meaningful to try to distinguish them. They are like one package. Equally, it does not seem very fruitful to attempt to distil any rigid, ‘EC pyramidal’ superiority for either of them. High level of safety is an absolute precondition for market access. And that covers the core of all industries, namely machines. Besides, the same harmonising structure also concerns Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment.

This harmonising structure is obviously difficult to conceive, at least with respect to a pending case in the ECJ, namely *AGM-COS .MET s.r.l. v. Finnish State and Tarmo Lehtinen* (hereinafter: *AGM-COS.MET*).¹⁶⁸ The district Court of Tampere, Finland, has made a reference for a preliminary ruling. The case includes a compensation claim by this Italian company, based upon some public statements of market inspector Lehtinen before the market surveillance decision by which a car lift, that is a machine covered by the MD, was accepted in cross-border trade. Market inspector Lehtinen had expressed safety concerns about it. Amongst others, one question (3 b)) also implies a reference to *national* safety rules as if they were relevant in the case. A special angle comes from the fact that the car lift belongs to the group of specifically risky machines with which even fatal accidents may occur because mechanics have to work under a heavy load, up to some 3,500 kg. The national court bound its *a priori* single relevant question (No.2) only

¹⁶⁷ Officially Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

¹⁶⁸ Case C-470/03 *AGM-COS.MET*. The questions subject to preliminary ruling are published in OJ C35, 7.2.2004. It is reachable via Internet, <www.europa.eu.int>.

to the MD, not to the Treaty.¹⁶⁹ ¹⁷⁰ Another question too (No. 1)¹⁷¹ concerning restrictions on trade will normally be answered in brief, due to the logic of these questions 1 and 2, whereas, consequently, the other questions, such as No. 3(a) dealing with proportionality and No. 4 with freedom of expression, will fall. Still, question 2 on the conformity of the lift with the essential safety and health requirements will normally lead to a positive answer (the lift does not conform) and, therefore, just repeating the existing case law concerning question 1: in case of harmonising EC law, alleged trade restrictions are assessed only under the harmonising law, not under Articles 28 and 30 EC.

However, this set of questions also raises a further question about the normative pyramid applicable in this case. Where is the pyramidal Apex this time? A further question is the possible role of proportionality in this context.

I see it as natural that in applying the MD to this case (i.e. answering question 2), the status in principle of protecting human health and life in relation to an economic freedom (free movement of goods) will be tackled in the Court's reasoning. In so doing, it seems natural to resort to the principle of high level of safety and health in Article 95(3) EC. Further on, a review of the establishment of the internal market in Article 3(c), social policy in Article 3(j) and high level of social protection in Article 2 EC would be no surprise. But the question is whether this shortlist is exhaustive and enough to derive or

¹⁶⁹ The national court asks whether a car lift (used in garages) is contrary to the essential safety requirements because 'in designing the structure account is not taken of the placing of the vehicle on the lift in either driving direction and the load calculations of each lifting arm are not done for the least favourable loading situation'. Being so, the lift was also designed and constructed deviating from the European CEN standard concerned. Indeed, the machine doesn't respect the principle of inherently safe machinery design and construction (Annex I, Essential Health and Safety Requirements, point 1.1.2(a)) and doesn't take account of any reasonably expectable use (Annex I, Essential Health and Safety Requirements, point 1.1.2(c)). An affirmative answer to the national court's question seems manifest.

¹⁷⁰ An *aberratio ictus* is in question No. 2, namely the reference to a *national* standard SFS EN 1493, as if the machine would have been manufactured - instead of Italy - in Finland, and as if this *national* standard would have some specific relevance in the case. In reality, harmonised *European* CEN standards show the state-of-art in technical sense and legally create, when complied with in designing and construction of a machine, a presumption of conformity with the essential health and safety requirements (see Article 5(2) MD). If a standard is not complied with, assessment of conformity is stricter (see Article 8(2) MD) but the same level of safety is required.

¹⁷¹ Question 1 in the case presupposes that the public statements of the market inspector would be assessed under Articles 28 and 30 EC (concerning free movement of goods). This proves that the national (district) court doesn't know the relevant case law. If there is a harmonisation measure, alleged trade restrictions (or measures with equivalent effect) are assessed only under that harmonisation measure, not under Articles 28 and 30 EC. See judgments (by the Court in plenum) C-37/92 *Vanacke*, [1993] I-4749, paragraph 9, and C-324/99 *DaimlerChrysler AG* [2001] I-9897, paragraph 32. However, also in another pending case subject to preliminary ruling, namely C-40/04 *Yonemoto* (see OJC 85/15, 3.4.2004), the referring court, this time the Supreme Court of Finland, makes in its question No. 1 the same mistake. Hence, it refers to Articles 28 and 30 EC in the context of MD. These events seem to prove that 'free movement' of the ECJ judgments is in troubles!

establish the principle that protecting human health and life is an honourable aim that is not subordinated to any proportionality test. This means that not the smallest fatal risk or even risk of injury is acceptable. I recall that, as such, both the overall philosophy behind the MD (only safe products are allowed to the market), as well as its wording in Article 2(1) fully justify a conclusion that the MD in itself is enough to exclude any proportionality test in applying the philosophy of the MD. Different semi-, quasi- or fully bureaucratic matters are, of course, in a different position. Equally, typing errors in instructions can be harmless and rectifiable or allowed by virtue of proportionality, but mistakes in instructions may lead to fatal accidents as well.

The proportionality principle is, however, worth a few more general remarks here. The Treaty on European Union in 1992 enshrined it in Article 5 (ex 3b) EC. This in formal terms seems also to push it into the EC normative pyramid of machinery safety. Literally it is (in Article 5 EC) only a sub-principle of subsidiarity. In case law it is, however, a rather over-arching principle.¹⁷² Even weighing fundamental rights against each other can be seen as one of its reflections, supposing that they in no case could empty one another of their respective contents. This might logically suggest the outcome that safety and health could never get a status overriding or even blocking the free movement of goods. Furthermore, it suggests that a 'proportionate' or 'reasonable' risk could be accepted or something similar in that line. I do emphasize that this is not just of academic interest. Seeing proportionality as a restriction on interferences in the market mechanism may easily lead to a position where the market freedom is seen as the legitimate driver whereas safety and health is just something corollary. And, indeed, this position is exactly present in question 3(a) in case *AGM-COS.MET*. The referring judge sees it as possible that even a machine not conforming to the MD could be accepted in the market by virtue of the proportionality principle. Equally, the market surveillance decision that launched the whole case *AGM-COS.MET* included, as its bottom line ground affecting the case outside the otherwise counted norms and facts, exactly

'- proportionality principle applied in the legal system of the European Community.'¹⁷³

And, besides these convulsions, the MD is only a directive while proportionality is in the EC Treaty, a tricky lawyer may say (perhaps invoking *lex superior*). In practice, he/she

¹⁷² As to proportionality principle in general, I confine myself here to a reference to Kapteyn and van Themaat, pp. 144-8. As to an essential *general* interpretation, they state – without saying anything at all about machinery safety – as follows: '[...] the great emphasis which Articles 2, 3 and 3a [now 4] EC place on the market economy principle should justify an interpretation of Article 3b [now 5] EC in the sense that no more far-reaching interference in the market mechanism is permissible than is necessary to achieve the objectives of the EC Treaty'. Ibid. p. 145-6.

¹⁷³ My translation. This needs to be also expressed in the original language, Finnish: "– Euroopan yhteisön oikeusjärjestelmässä sovelletun suhteellisuusperiaatteen." The decision-makers obviously mean the legal *order* of the European Community. However, this is not just of unintended comics but a telling example of the sometimes too paradigmatic effect of proportionality principle.

may intimidate a safety engineer that fully understands the MD and fully respects its purpose but is not familiar with proportionality. The MD does not mention proportionality at all.

If Articles 2, 3 and 95(3) EC (and the MD or, on the other hand, the MD alone) are not enough, and/or if the constitutional traditions common to the Member States are not enough, to support the principle ‘no risk of accidents accepted, no proportionality test in this respect’, the Court obviously has to base itself on Article 2 EHRC that enshrines the protection of human life. In *Schmidberger* the Court sitting in plenum confirmed how the right to life is, unlike freedom of expression or the freedom of assembly, an absolute fundamental right.¹⁷⁴ If the Court does not go this far, it anyway seems to be a legitimate expectation that it in one way or another will decide in the case *AGM-COS.MET* that the protection of human life and health is an honourable aim or principle without being harassed by any proportionality test – it is not possible to be proportionally dead. Neither is a proportionality test relevant with respect to injuries while the philosophy in the MD means preventing them all. Discussing an invalidity percentage perhaps allowed by the MD would be too banal from the outset. This would also mean that safety and health, *das Sozial*, in this case is not be subordinated to the economic freedom, i.e. free movement of goods, but the other way round. The economic freedom shall be subordinated to safety and health, a social factor, although precisely in the sense that safety is the absolute precondition for market access.

If one wants to avoid any ‘stratospheric’ inclusion of Article 2 EHRC in the normative pyramid, as well as any normative source above the MD, I do not insist on the above arguments, with the condition that the aim to protect human life and health is declared an honourable one that is not subordinated to the proportionality principle. Even this would mean recognising the *de facto* overriding role that a high level safety and risk-prevention policy have in the combination of economic and social in this type of case. The legal basis for this is also in the constitutional traditions of the Member States, as expressed in the EU Charter of Fundamental Rights. Its Article 31 states, as follows:

Fair and just working conditions

‘1. Every worker has the right to working conditions which respect his or her health, safety and dignity.’

This Article is based – as the Charter’s explanations tell us - on the so-called Framework Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It is the most important community instrument that, however, does not cover the properties of machines, as they appear on the market. It is not in contradiction with the Machinery Directive but includes a comprehensive minimum framework for safety and health measures. Its hierarchy in risk prevention is the same as in the MD, ‘avoiding risks’ is the first consideration (Article 6(2)(a) of the Directive 89/391/EC).

¹⁷⁴ Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 80.

There is nothing in the text of Article 31 of the Charter that would hint at any restriction as to its application *rationae personae*. ‘Every worker’ is addressed. Thus, workers using potentially hazardous or risky machines are also worthy of appropriate protection. On the other hand, the explanations to the Charter refer to Article 140 EC as a source for the notion ‘working conditions’. Article 140 EC, fifth indent, does mention ‘prevention of occupational accidents’. Furthermore, the Charter’s text draws on the European Social Charter (Article 3) and on the Community Charter of Fundamental Rights of Workers (Article 19). Next to these international instruments, the Member States have comprehensively ratified a number of ILO conventions in the field of safety and health. In sum, it is justified to hold that there is a common constitutional tradition of safety and health between the Member States.

The Court’s forthcoming answers to the *AGM-COS.MET* referral seem certain to be that the behaviour of market inspector Lehtinen was not a prohibited restriction on trade and the car lift concerned is not in conformity with the essential safety requirements of the Machinery Directive.

Finally, somebody may raise objections to my overall MD reasoning by maintaining that also in B to B business only safe products can be marketed, that nobody buys unsafe ones; that it is therefore not *economic* (profitable) to manufacture and try to sell risky products. In this case safety and health experts of every Member State, as well as the Commission, share the opinion that the machine is risky and does not meet the essential safety requirements of the MD.¹⁷⁵ But being cheaper than products manufactured according to the European standard (EN 1493) concerned, this lift type has anyway been successful on the European market. Economic has this side, too. Manufacturers do have their tendency to use, even abuse, the customer’s tendency to save money whenever possible.

However, my conclusion is that machinery safety represents one phenomenon that does not fit into a rigid converse pyramid thinking with economic dominance. On the contrary, it implies a deeply tied package where high level of safety (a social factor) is a precondition for a fundamental economic freedom to be exercised. I should emphasise that this is no guarantee of reaching that high level in practice. Further on the pyramid avenue, there is only one single machinery safety pyramid left for both the EC and Member States. The MD embodies this and has replaced the national norms. Hence, national norms do not set up the safety level but are purely there for execution and reinforcement. But where is the pyramidal apex in the *AGM.-COS.MET* case? Might this be the first case where the European Court of Justice raises the EU Charter of Fundamental Rights into its very reasoning as the Court of First Instance and several Advocate Generals have done? *Jura novit curia*.

¹⁷⁵ Data sheet of the Co-ordination of the notified bodies, document CNB/M/08.016, Revision 02 by 1 July 2004.

2.6. Competition Rules v. Right to Collective Bargaining¹⁷⁶

Fitzpatrick refers, without any real analysis, twice to case *Albany International*,¹⁷⁷ first in a footnote proving the avenue that ‘internal market issues retain the potential to create such “spill-over” controversies [with social policy] in the future.’¹⁷⁸ Later he notes how

“‘middle layer’¹⁷⁹ areas of competence are intrinsically vulnerable to apparently superior EU economic values. Therefore social values have to fight their way to an internal market agenda, for example in the recent conflict between competition policy and the right to free collective bargaining.’

As an example of these clashes he then refers – again in a footnote - to *Albany*.¹⁸⁰

In brief, in *Albany* the question was about the possible immunity of collective agreements *vis-à-vis* competition rules. The outcome established the immunity in so far as the agreements by their purpose (in this case remuneration) fall outside Article 81 (ex 85) EC. Not everybody celebrates; some have regretted the supremacy granted to labour and social dialogue under Article 81 EC.¹⁸¹ ‘Law and economics’ criticism exists, demanding an economic effectiveness test and even with pondering the positive and negative effects of unionisation etc.¹⁸² A third type of criticism regrets that the decision was not taken directly under Article 81 (ex 85) EC but was based (even) on Articles 2 and 3 EC.¹⁸³

In the context of the pyramid approach, it is, indeed, elementary to conceive the way in which the Court came to its decision in *Albany*. A graphic mirror is the Opinion of

¹⁷⁶ I recall my aim to publish a separate article on the social dimension in EU competition law. Here I set forth only some elementary features, necessary for the assessment of the pyramid thinking.

¹⁷⁷ See footnote 132, *supra*.

¹⁷⁸ *Idem*, p. 307, footnote 30. *Fitzpatrick* refers to case notes on *Albany* by Stephen Vousden. I think that Vousden’s article brings one example of an unsuccessful attempt to interpret *Albany* by the maxims of competition law. See Bruun & Hellsten (eds.), *Collective Agreement and Competition Law in the EU*, DJØF, Copenhagen 2001, p. 53, footnote 113.

¹⁷⁹ It is a graphic expression, indeed. For *Fitzpatrick*, ‘social’ in the leading Articles is mainly of lip service.

¹⁸⁰ *Idem*, p. 313. *Fitzpatrick*’s footnote 72.

¹⁸¹ Marc de Vos, *Collective Labour Agreements and European Competition Law : an Inherent Contradiction* in De Vos (ed.), *A Decade Beyond Maastricht : The European Social Dialogue Revisited*, Kluwer Law International, the Hague 2003, pp. 70-72. For him, Article 4 EC ‘clearly’ presents the common market and its free competition as overarching goals from which no EC policy can be exempted. He laconically continues that ‘(i)f any hierarchy is to be wrung from the TEC, precedence should rather go to competition policy over social policy rather than *vice versa*’; p. 72.

¹⁸² Van den Berg and Camesasca, *Irreconcilable Principles? The Court of Justice exempts collective labour agreements from the wrath of antitrust*. *European Law Review*, Vol. 25. 2000, pp. 492-508.

¹⁸³ Xavier Prétot, *La Cour de justice des Communautés européennes et les fonds de pension néerlandais*. *Droit social* 1/2000, pp. 106-110.

Advocate General *Jacobs*. From a traditional competition point of view, he e.g. asked if there is a general exemption of social matters from competition rules regarding agriculture and transport.¹⁸⁴

The Court construed and answered a similar (but more limited) pre-question about a general exemption for collective agreements from competition rules, but differently.¹⁸⁵ It recounted (in paragraph 54) from Article 3 EC how the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere'; it went on by referring to a particular task of the Community 'to promote throughout the Community a harmonious and balanced development of economic activities' and recalled 'a high level of employment and of social protection' (Article 2 EC). It further recounted Articles 118 (promotion of cooperation also at collective bargaining) and 118b EC (reference to European social dialogue and possible agreements), as well as Articles 1 and 4(1) of the Maastricht SPA.¹⁸⁶

This way, the Court construed its EC Treaty pyramid (as applicable in this case). The answer is graphic in paragraphs 59 (*rationae personae*) and 60 (*ratione materiae*) of *Albany* where the conclusion, the setting up of the basic immunity of collective agreements was concluded, as follows:

59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) [now 81(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) [now 81(1)] of the Treaty. (underlining JH)

¹⁸⁴ Opinion of AG Jacobs 28.1.1999, paragraphs 123-4.

¹⁸⁵ Noteworthy, as to pyramid thinking, the Court did not discuss whether there is sufficient basis in the national law to conclude that there is a fundamental right to collective bargaining, recognisable also under EC law.

¹⁸⁶ Paragraphs 55-58 of the judgment. Reference to SPA was no majesty crime since the UK in June 1997 declared that it de facto (not de jure) joined the SPA. Besides, the Treaty of Amsterdam introduced Article 136 that refers to the 1989 Charter.

As the French wording proves,¹⁸⁷ ‘effective’ and ‘consistent’ here qualify the interpretation, not the EC Treaty! Anyway, in balancing between the undistorted internal market (competition rules) and social policy (collective agreements) the latter was given precedence. The Court, in paragraph 59, assessed and declared the (presumably seriously undermined) lot of social policy objectives if the negotiating social partners were subject to competition rules, not the other way round! Certainly, the final conclusion in paragraph 60 did not mean any safety valve for the protection of high national values (free collective bargaining) à la pyramid thinking with economic dominance. It was a fundamental decision made in applying the EC Treaty.

The immunity, however, allows competition law scrutiny in exceptional cases. It means a safety valve for protection of competition values (as in the case of a distortion of competition masked by a collective agreement). Even the immunity for collective agreements as proposed by Advocate General, too, was finally a balance between two sets of norms of the ‘same rank’.¹⁸⁸ However, following his much more competition-orientated analysis he equipped it with competition law filters (good faith, limited to core subjects, no effects on third markets and parties).¹⁸⁹ But it is crucial to understand that a rigid pyramid thinking with the economic’s dominance over social would have led first to the subordination of collective agreements to competition rules and then construing a safety valve for collective labour agreements.¹⁹⁰ The Court did the opposite.

Thus, it was coherent for the Court in this context to take first economic and social together as built into the EC pyramidal structure (like the double aim – economic and social - of Article 119 EEC and the ‘foundations of the Community’ in *Defrenne II*) and then to strike a balance between them. It was not giving an *a priori* absolute precedence to one of them. Effective (utile) seems to denote more the outcome in this concrete case, i.e. the precedence of the social factor.

The ironic situation is that e.g. under Finnish and Swedish law the wrath of competition rules on collective agreement has been clearly stricter than the Albany-immunity.¹⁹¹ Hence, whether it is of *minutiae* or not, the pyramids have the ability to be converse this

¹⁸⁷ <Il résulte ainsi d'une *interprétation utile et cohérente* des dispositions du traité, dans leur ensemble, ...> This is a unique formula in case law that I know. I recall, however, that ‘interpretation of the provisions of the Treaty as a whole’ is also an expression used in case *CILFIT* (see Chapter I, section 2.2.2, supra). Hence, finally the qualification ‘effective and consistent’ (interpretation) was the novelty so declared in *Albany*.

¹⁸⁸ Para 179 of the opinion. Another issue is that the pyramid construed by Advocate General did not reach Article 2 EC, neither did he expressly mention ‘policy in the social sphere’ as enshrined in Article 3(j) EC.

¹⁸⁹ Paragraph 194 of the Opinion.

¹⁹⁰ Cfr. turning imaginably around the reasoning in para 59 of *Albany*: ‘competition law objectives would be seriously undermined if the negotiating social partners were not subject to Article 81 EC’!

¹⁹¹ See e.g. Jari Hellsten, Collective Agreements and Competition Law in Finland, in Bruun & Hellsten (eds.), Collective Agreements and Competition Law in the EU, DJØF 2001 Copenhagen, p. 134, paragraph 45; and Jonas Malmberg, Collective Agreements and Competition Law in Sweden, *ibid*, p. 204-5, the newspaper distribution case, referred to in footnote 63 on p. 205.

way, too. However, as to EC law, *Albany* proves that a rigid pyramid way of thinking with economic dominance does not give rise to a sustainable model of assessing and interpreting the EC Treaty in a comprehensive way, even though many individual cases¹⁹² with their *minutiae*, no doubt, reflect the dominance of the internal market rules.

Ultimately, concerning judgement *Albany* as it stands, the Court did not write out in its pyramid, paragraphs 54-58, the ‘stratospheric’ apex of the EC Treaty, namely the Preamble, as it did in 1976 in *Defrenne II*. This time it was no longer needed, following the enshrinement (in the Maastricht Treaty) of ‘high level of employment and social protection’ in Article 2 EC and social policy in Article 3(j) EC. This is a clear indication of a high ‘pyramidal’ (i.e. constitutional) development and its impact on a more practical level. Still, ‘the provisions of the Treaty as a whole’ (paragraph 60 of *Albany*) fully cover even that pyramidal apex.¹⁹³

2.6.1. Some Post-Amsterdam Remarks regarding *Albany*

The events in *Albany* took place in the early 1990’s. If the Court should have had to apply the EC pyramid as modified by Article 136 of the Treaty of Amsterdam, the European Social Charter and the Community Charter of Fundamental Social Rights 1989 would have perhaps enriched the argument, supporting the outcome reached. Both Charters refer to collective bargaining. But, in that case the Court would have been perhaps bound to give due weight to the ‘functioning of the common market’ that still hides in Article 136(3) EC. Notably, neither was Article 117 EC in the Court’s pyramid, which was logical in the sense that it did not mention collective bargaining.

There remains the effect of the EU Charter of Fundamental Rights and the Constitutional Treaty (when and if it enters into force). With enshrined references to collective bargaining and even to the right to strike they would further strengthen the line of reasoning and the outcome in *Albany*.

2.7. Miscellaneous

Transfer of Undertakings. Earlier in this article I have shown how the Transfer of Undertakings directive also applies to cross-border transfers and mergers, and covers transfers within a group of companies too.¹⁹⁴ I further recall how in case *Amalgamated Construction* the alleged transferee invoked competition rules and their application so as to prevent the group of companies from falling under the ambit of the Transfer Directive. Finally with the famous ‘nothing’ (*Nothing justifies...*, paragraph 20 of the judgment) the Court rejected the claim of the company where this ‘nothing’ finally is an assertion based on social values. Anyway, these phenomena as such do not fit into a rigid pyramid

¹⁹² See, e.g., case C-179/90 *Merci* [1991] ECR I-5889.

¹⁹³ In a way, the Court in *Albany* applied a ‘Cheops model’; the Cheops pyramid’s apex has knowingly got worn some 5 to 7 meters. The top level is flat.

¹⁹⁴ See sections I.2.2 and I.3, *supra*.

way of thinking. Furthermore, if we look at the Transfer Directive as a whole, as a structural factor, we find that on the one hand it does not disturb the managerial prerogative in realising even transfers primarily and solely benefiting the owners. It just smoothens them as any national law in market economy may do, without actually preventing them. On the other hand, it is intended to protect the rights of workers ‘as far as possible’ (as we have learned at least from Daddy’s Dance Hall and Amalgamated Construction), and it would be in any case unjustified to maintain that within these limits it would be, even in its *minutiae*, just subordinated to the economic aspect, the managerial prerogative.

On a somewhat different line *Bernard Johann Mulder* concludes his reasoning (in his doctoral dissertation of November 2004) on the Directive by writing that ‘The EU Court has in its law-making taken the directive’s aim to safeguard the employees’ rights for granted. This aim to safeguard has, however, not in a particular way been confronted with the *fundamentals of the economic constitution* that govern the legal scene in which the regulations on the transfer of undertaking directive are applicable.’¹⁹⁵ My thesis is that the cross-border applicability means facing these fundamentals, coming even close to free movement of capital. Based on my reasoning *supra*, there is no reason to believe that the Court would turn the Directive concerning this issue into a non-directive à la rigid pyramid thinking.

Societas Europaea. The European Company structure means freedom for business activities throughout the EU/EEA. The way in which the structure handles the representation means in broad terms that an SE gets registered only if there is an agreement on employees’ information, consultation and participation. In the way for example that only safe machines may circulate freely within the internal market,¹⁹⁶ only a SE equipped either with a tailor-made agreement or applying the standard rules may enjoy the corresponding economic freedom (freedom of business). Setting up the SE is thus subordinated to arranging the representation of workers and employees. It is a structural factor that does not fit into rigid pyramid thinking.

3. Converse Pyramids in Earth. What Instead?

The EU’s social constitution is so to speak in a marriage of convenience with its economic constitution. Divorce is impossible whilst quarrels sometimes awake the neighbours. It is difficult to reconcile, on the one hand, the fundamental economic freedoms and related provisions guaranteeing the undistorted internal market, and, on the other hand, fundamental social rights.¹⁹⁷

¹⁹⁵ Mulder, p. 357; italics by JH.

¹⁹⁶ See section II.2.5.

¹⁹⁷ However, some further clarity could be achieved with a debate on Europe’s ‘social contract’. Both efficiency and distributive justice may qualify its contents. The first choice is, in terms of Maduro, between wealth maximisation and distributive justice; the second is to do with whether we favour a model of economic integration or a model of political integration for Europe. As Maduro has done, I claim that it is necessary to complement the wealth maximisation brought

However, I will take the liberty to omit any pyramid of the EC Treaty, even though my examples would justify enshrining the social dimension above the economic dimension. As a general description, it would not be correct, given the *acquis* as a whole. Besides, it would hide the reconciliation process. Accordingly, enshrining the undistorted internal market and the social dimension on an equal footing would for example ignore the *de facto* precedence of the social dimension in *Albany*. And, I claim, the reconciliation process between economic and social would not end up with the emergence of an imaginable full-fledged European labour law. In the meantime, the enlargement of the EU will produce some graphic legal illustrations of this economic/social conflict, as the pending Rosella case proves.¹⁹⁸

about by economic integration with some form of distributive fairness. See Miguel Poiates Maduro, *Europe's Social Self: "The Sickness Unto Death"* in Shaw (ed.) *Social Law and Policy in an Evolving European Union*, Oxford, Hart Publishing 2000, p. 349. It remains to be seen whether the 'highly competitive social market economy', enshrined in Article I-3(3) of the Constitutional Treaty, together with the insertion of the Fundamental Rights in Part II of the Constitutional Treaty, already means some kind of contract, or whether it is just a modified framework for future quarrels. It is also linked to the debate about the transformation of the original European 'market citizen' via the 'Maastricht citizen' to a more real 'European citizen'. However, that debate goes far beyond the borders of the 'rough' internal market issues that have filled this paper.

¹⁹⁸ See section II.2.4. After closing the contents of this article the High Court of London has declared in June 2005 (Case No: 2004, Folio 684) i.a. that an action of the ITF and the Finnish Seamen's Union restricting the ability of the employer (Viking) to negotiate with a union in a Member State other than Finland on wages in the context of reflagging the Rosella would be contrary to Article 43 EC. Accordingly, the court issued a permanent injunction against an action (incl. causing it) for the purpose of requiring Viking to apply, after the reflagging, the Finnish or equivalent terms and conditions. The judgment is subject to appeal.

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The Second Article
of the Doctoral Dissertation
‘From Internal Market Regulation to European Labour Law’

On the Social Dimension in Posting of Workers

**Reasoning on Posted Workers Directive,
Wage Liability,
Minimum Wages and
Right to Industrial Action**

Jari Hellsten (ML)
Hanken School of Economics,
Helsinki, Finland

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Table of Contents

Index	II
Tiivistelmä	IV
Sammandrag	V
Publisher's Note	VII
Foreword	VIII
Abstract	1
Introduction	3
 Chapter I	
Posted Workers Directive in the Treaty Framework	6
1.1 The Directive and the Rome Convention	6
1.2. The Framework in the Treaty	7
1.2.1 Relation to Free Movement of Workers	7
1.2.2 Pre-Directive Case-Law on Posting	9
1.2.3 Labour Law Restrictions under the Treaty; <i>Arblade</i> -Test	13
1.3. Posting of Workers in EC Law; the Prudent Marriage of "Economic" And "Social" Factors	17
1.3.1 History and Background of the Posted Workers Directive	17
1.3.2 Some Market Aspects Behind the Directive	18
1.3.3 Once Again: Why a Directive?	20
1.3.4 Raison D'Être of the Directive	22
1.3.5 Some Basic Assessments of the Directive's Raison D'Être	24
1.3.6 Author's View; Summing up	32
 Chapter II	
Liability of Principal Contractor	36
2.1. General Remarks	36
2.2. Case <i>Wolff & Müller v Pereira</i>	37
2.2.1 Facts and Questions	37
2.2.2 The Argumentation of Principal Contractor	39
2.2.3 Rieble's and Lessner's Liability Argumentation	41
2.2.4 Dörfler's Liability Argumentation	44
2.2.5 Substantive Part of Judgment <i>Wolff & Müller</i>	46
2.2.6 Effect of <i>Wolff & Müller</i> on Other Liability Schemes	51
2.2.7 Finnish Scheme	52
 Chapter III	
Minimum Wages under PWD	54
3.1 General Remarks	54
3.2 Pay Jungle in Construction Industry	55
3.3 Infringement Case <i>Commission v Germany</i>	57
3.3.1 Background	57
3.3.2 Main Submissions	59
3.3.3 Reasoning of the Court with Comments	60

3.4 From <i>Seco</i> to Alteration Clause - Entirely Normal?	67
3.5 On Pay Comparisons in General	68
Chapter IV	
On the Right to Strike in EC Law	71
4.1 Background	71
4.1.1 First Reference Question in <i>Laval</i> ; Recital (22) of the Preamble to the Posted Workers Directive	73
4.1.2 Second Reference Question: Lex Britannia	74
4.2 Horizontal Direct Effect of Articles 49 and 50 EC	75
4.2.1 Reach of Horizontal Direct Effect of Articles 49 and 50 EC	78
4.3 Right to Strike in the Ambit of EC Law?	79
4.4 On Protection of the Right to Strike in the Context of EC Law	84
4.4.1 General Remarks	84
4.4.2 ILO Provisions	86
4.4.3 European Human Rights Convention	88
4.4.4 European Social Charter	90
4.4.5 United Nations' Covenants	91
4.4.6 Community Law and Charters	91
4.4.7 Member States' Constitutions	94
4.4.8 Summing up; Comparing International Treaties	95
4.5 Article 307 EC	97
4.6 General International Law	99
4.7 Intermediate Concluding Remarks	100
4.7.1 ILO Supervision v. EU Proceedings	102
4.8 EC Case-law	106
4.9 Right to Strike in the Framework of Free Provision of Services	108
4.9.1 General Aspects	108
4.9.2 Elaborating Remarks; Relation to Earlier Case-law	111
4.9.3 Public Policy (<i>ordre public</i>) Provisions	113
4.9.4 Justification of Lex Britannia	115
4.10 Converging Doctrines on Services and Fundamental Rights	117
4.10.1 Proportionality and Acceptability Aspects	117
4.10.2 Lot of Danish-Swedish Model	120
4.10.3 Convergence of the Two Doctrines in Practice	121
4.10.4 Applying the Line of Argumentation	122
4.10.5 Reach of Case <i>Laval</i> ; Case <i>Viking v. ITF</i> and <i>FSU</i>	127
Bibliography	134

Tiivistelmä

Tutkimuksen ensimmäisestä luvusta käy ilmi – ehkä tähänastista kirjallisuutta selvemmin – miten lähetettyjen työntekijöiden direktiivi (LD) on aiemman oikeuskäytännön jatke ja alistuu sellaisena perustamissopimuksen artiklojen 49 ja 50 EY kehikkoon. Oikeuskäytäntö toisaalta osoittaa sisämarkkinoita koskevien käsitysten perustavaa laatua olevan luonteen. Sekä oikeuskäytäntö että LD hylkäävät ajatuksen toisista jäsenvaltioista tulevan matalapalkkakilpailun sietämisen pakollisuudesta. Lisäksi LD asettaa velvoitteen hylätä matalapalkkakilpailu, jos jäsenvaltiossa on sitovat vähimmäispalkat. LD yhdistää näin reilun kilpailun ja työntekijöiden oikeuksien suojan. Kokonaan päinvastainen käsitys, joka korostaa matalapalkkakilpailua perustamissopimuksesta johtuvana seikkana, on vaikuttanut varsinkin Saksassa näihin päiviin asti. Oikeuskäytäntö lopulta osoittaa myös sen, miten yhteisöoikeus tällä alueella perustuu kilpailun vääristymiä ennalta ehkäisevään sääntelyyn, joka yhdistää työnantajien ja työntekijöiden edut. Se heijastaa myös perinteistä työoikeudellista ajatusta, että työvoima ei ole kauppatavaraa.

Tilaaajanvastuussa tuore oikeuskäytäntö osoittaa, miten jäsenvaltiot ovat LD:n kautta, ja sen toimeenpanemiseksi, oikeutettuja tilaaajanvastuun kaltaisiin järeisiin valvontatoimiin. Tämä oikeuskäytäntö (jota käsittelee luku II) yhdessä vähimmäispalkan määrittelyä koskevan oikeuskäytännön (jota käsittelee luku III) kanssa osoittaa tarpeen lukea ja soveltaa LD:tä – kuten yhteisön muutakin, palvelutarjontaa koskevaa johdettua oikeutta – yleiseen etuun perustuvien palvelutarjonnan rajoitusten yleisten kriteerien valossa. Sekä vastaavuus- että suhteellisuusperiaate ovat asiaan vaikuttavia tekijöitä sovellettaessa työntekevaltion oikeutta ulottaa kansalliset vähimmäispalkkamääräykset lähetettyyn työvoimaan. Perimmiltään suhteellisuusperiaate, ollen yhteisöoikeuden periaate, toimii (vain) varaventiilinä ns. sosiaalista protektionismia vastaan. Keskustelu ja käytäntö tilaaajanvastuusta toisaalta havainnollistavat sitä, miten itse matalapalkkakilpailun estäminen heijastaa sellaista yleistä etua, joka voi oikeuttaa palvelutarjonnan rajoituksia.

Lähetetyn työvoiman työehdot voivat luonnollisesti johtaa näiden ehtojen taustalla vaikuttavan tai niiden kollektiiviseen sääntelyyn nimenomaisesti tähtäävän työtaistelu/lakko-oikeuden käytön oikeudelliseen arviointiin. Tämän tutkimuksen IV luku päätyy johtopäätökseen, että Kansainvälisen Työjärjestön ILO:n piirissä muotoutunut työtaisteluoikeus sitoo myös EU:ta, pääosin jäsenvaltioiden aiempia kansainvälisoikeudellisia sopimuksia koskevan EY 307 artiklan kautta ja lopuiltakin osin yleisen kansainvälisen oikeuden varassa, siten kuin ne molemmat on tähän mennessä ankkuroitu EY-tuomioistuimen käytännössä. ILO:n piirissä työtaisteluoikeus johdetaan nykyään työehtosopimusneuvottelu-oikeuden tehokkaasta toteuttamisesta. EU toisaalta edistää – myös oikeudellisesti - ILO:n työelämän perusoikeuksien toteutumista, minkä täytyy koskea myös sitä itseään. EU:ssa työtaisteluoikeus nojautuu myös sen johtaviin periaatteisiin (art. 6.1 EU): vapaus, kansanvalta, ihmisoikeuksien ja perusvapauksien kunnioitus sekä oikeusvaltioperiaate. Ensimmäisissä työtaisteluoikeutta koskevissa tapauksissaan EY-tuomioistuimen haasteena on suojella tätä perusoikeutta palvelutarjonnassa. Ennakoidusti se tulee tapahtumaan yhdistämällä aiemmat opit palvelutarjonnan rajoituksista ja perusoikeuksien suojasta. Tapaus 'Laval' koskee lisäksi Ruotsin ja Tanskan työehtosopimukseen perustuvan mallin asemaa Euroopan yhteisössä.

Sammandrag

Första kapitlet i denna studie påvisar – kanske tydligare än tidigare litteratur – att EG:s utstationeringsdirektiv (96/71/EG) bygger vidare på tidigare rättspraxis och väl låter sig inordnas under fördragets artiklar 49 och 50 EG. Av rättspraxis framgår den inre marknadens grundläggande karaktär. Såväl rättspraxis som utstationeringsdirektivet innebär ett avståndstagande från tanken att medlemsstaterna vore tvungna att tolerera låglönekonkurrens från andra medlemsstater. Dessutom upprätthåller utstationeringsdirektivet en skyldighet att begränsa låglönekonkurrens, då det finns bindande minimilöner i respektive medlemsland. Härigenom kombinerar utstationeringsdirektivet kravet på en sund konkurrens med hänsyn till arbetstagarnas skydd. En helt motsatt uppfattning (som betonar låglönekonkurrens som en fördragsbestämd faktor) har särskilt i Tyskland gjort sig gällande ända fram till dessa dagar. Rättspraxis å andra sidan ger vid handen hur gemenskapsrätten på detta område grundas på förhandsreglering av konkurrenssnedvridningar genom att kombinera arbetsgivarnas och arbetstagarnas intressen. Detta återspeglar också ett tänkesätt enligt vilket arbetskraften inte är en handelsvara.

Rättspraxis om det så kallade beställaransvaret ger vid handen att medlemsstaterna genom införandet av utstationeringsdirektivet, och för att implementera det, är berättigade till starka kontrollåtgärder såsom beställaransvaret. Denna rättspraxis (som beskrivs i kapitel II) tillsammans med rättspraxis gällande bestämning av minimilöner (som beskrivs i kapitel III) utvisar behovet av att tolka och tillämpa utstationeringsdirektivet – liksom annan sekundär gemenskapslagstiftning – i ljuset av de allmänna regler gällande det offentliga intresset som motiverar begränsningar i rätten att fritt tillhandahålla tjänster över medlemsstaternas gränser. Både motsvarighets- och proportionalitetsprincipen är relevanta vid en tillämpning av nationella minimilöner på den till landet utstationerade arbetskraften. Slutligen är proportionalitetsprincipen som en gemenskapsrättslig kategori en säkerhetsventil mot såkallad social protektionism. Praxis och debatt om beställaransvaret ger å andra sidan vid handen hur begränsning av låglönekonkurrens kan återspegla ett sådant allmänintresse som kan rättfärdiga begränsningar i tillhandahållandet av tjänster.

Den utstationerade arbetskraftens arbetsvillkor kan naturligtvis komma att bestämmas under direkta eller indirekta hot om kollektiva kampåtgärder. Det fjärde kapitlet i denna studie kommer till den generella slutsatsen att den inom ILO utvecklade rätten till fackliga påtryckningsåtgärder är rättsligt relevant också för den europeiska gemenskapen. Denna uppfattning stöds på artikel 307 EG och sist och slutligen också på den generella internationella rätten i enlighet med EG-domstolens praxis. Både inom ILO och EU ses rätten till strejk/kampåtgärder numera som en nödvändig del i det effektiva införlivandet av rätten till kollektiva förhandlingar och avtal. Inom gemenskapen är denna rättighet bunden också till dess grundläggande principer: frihet, demokrati, respekt för de mänskliga rättigheterna och de grundläggande friheterna samt till rättsstatsprincipen. I sina första mål om strejk/kampåtgärder ställs EG-domstolen inför utmaningen att skydda denna grundläggande rättighet vid tillhandahållandet av tjänster. Man kan förutspå att detta kommer att ske genom att kombinera de tidigare hävdade synsätten om skyddandet av de grundläggande rättigheterna och om tillåtna begränsningar vid tillhandahållandet av

tjänster. Det svenska fallet ”Laval” gäller ytterligare till en del den dansk-svenska kollektivavtalsbaserade modellens ställning inom den europeiska gemenskapen.

Publisher's Note

The principle of tripartite co-operation is essential for Finland's policy in labour market matters. It is observed as well by the Ministry of Labour when providing the framework and financing for research on various working life issues, European Labour Law included. Consequently, the steering group of the study written by Mr. Jari Hellsten has been tripartite consisting of the representatives of the Ministry and social partners, and also academics. However, the researcher has done independent work. The views expressed do not bind the Ministry of Labour or other participants in the group.

This study, co-financed by the Ministry of Labour, traces the development of EU labour law and places special emphasis on some of the most current topics of this development.

Helsinki, 20th December 2005

Jouni Lemola

Chairman of the Steering Group
Ministry of Labour

Foreword

This study forms part of the wider project "*From Internal Market Regulation to European Labour Law*", financed by the Finnish Work Environment Fund, the Finnish Ministry of Labour and several Finnish trade union organisations. It focuses especially on the relationship between the free movement of services as a basic freedom in the EC legal system and the social dimension and protection of workers in situations where they are sent to perform services or work in a Member State other than the one where they habitually work.

The project leader and research manager is Professor Bruun and Jari Hellsten is the researcher. This report is the second published within the framework of this project. The first one "*On Social and Economic Factors in the Developing European Labour Law*" was published last year in Sweden (Arbetsliv i omvandling 2005:11, National Institute for Working Life).

The topic is of general interest, not least since the enlargement of the European Union in 2004 lead to greater discrepancies between living and working conditions in different Member States. The debate on the still pending Commission proposal for a Services Directive and some court cases on the relationship between the freedom to undertake industrial action and the basic economic freedoms in the EU system have also brought much public attention to the problems that *Jari Hellsten* focuses on in this study.

We wish to thank all the colleagues and friends who have commented on the manuscript and also helped us in different ways. It goes without saying that all responsibility for remaining shortcomings lies with the author and his supervisor. We also wish to express our gratitude to the Finnish Ministry of Labour for publishing this report in its scientific series.

Helsinki, 31 January 2006

Niklas Bruun
Professor

Abstract

In this study I discuss the Social Dimension in the Posting of Workers in four chapters: I: Posted Workers Directive (PWD) in the Treaty Framework; II: Wage Liability of Principal Contractor; III: Minimum Wages in Posting; and IV: The Right to Strike in EC Law, more particularly in the Framework of Free Provision of Services.

In the first Chapter it is shown – perhaps more clearly than in the earlier doctrine – that the PWD is an extension of the preceding case-law and is subject to the overall Treaty framework in Articles 49 and 50 EC. Case-law shows the fundamental considerations that affect the contents and nature of the internal market. Both case-law and the PWD reject the idea of low-wage competition from other Member States as inherent and accepted in the internal market. Furthermore the PWD imposes an obligatory rejection of low-wage competition if there are binding minimum wages in a Member State. In this way the PWD combined fair competition and the protection of workers. A diametrically opposite argumentation (endorsing the right to low-wage competition as inferred from the Treaty) has existed, especially in Germany, up to recently. Finally, case-law shows how the EC law in this field is based on the concept of preventing distortion of competition by means of regulation, thus combining the interests of workers and employers; it also reflects the concept that labour is not a commodity.

Regarding the liability of the principal contractor, recent case-law shows how the Member States are mandated by the PWD to resort to heavy structural measures such as wage liability in enforcing the PWD. This case-law (discussed in Chapter II), together with that concerning the definition of minimum wages (discussed in Chapter III), shows in more detail the need to read and apply the PWD, as any other part of secondary EC law, in the overall context of justifying restrictions on the free provision of services by overriding requirements of general interest. Equivalence and proportionality assessment are both relevant factors in applying the host state's right to extend the national minimum wages to posted workers. In the end, the proportionality assessment, strictly as a concept of EC law, works (only) as a safety valve against social protectionism. On the other hand, the liability debate illustrates how the prevention of low-wage competition reflects the general interest that may justify restrictions on the free provision of services.

The working conditions of posted workers may naturally lead to a legal assessment of the right to strike/industrial action behind these conditions or a striving towards a collective agreement thereon. This research (Chapter IV) leads to the conclusion that the ILO right to strike also binds the EU, partially as based on prior international agreements under Article 307 EC and finally due to general international law, as anchored in the existing case-law of the ECJ. In EU law, the right to strike is enshrined in the Charter of Fundamental Rights of the EU which, in the same way as the ILO nowadays, derives that right from the right to collective bargaining. Within EU law, protection of the right to strike is tied to founding principles of the Union: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. As the first direct strike cases (*Laval*, and *Viking v. ITF and FSU*) are now pending for a preliminary ruling, the European Court of Justice faces a great challenge in applying and protecting the fundamental right to strike/industrial action in the

context of the free provision of services. This is normally achieved by converging it with the doctrine of justifying restrictions on the free provision of services. The case *Laval* further deals with the position within the Community of the Danish-Swedish labour market model, which is crucially based on collective agreements, where it deserves its place.*

* The manuscript was substantively closed on 14 November 2005.

Introduction

This study is part of a wider project covering the evolution of EC employment and social law. An article 'On Social and Economic Factors in the Developing European Labour Law; Reasoning on Collective Redundancies, Transfer of Undertakings And Converse Pyramids' has been published¹ and a third study will deal with the social dimension in EC competition rules. A synthesis book should be ready by summer 2006 covering in broader terms the developments of EC law in this area, and whether and to what extent it is justified to speak about European Labour Law.

The enlargement of the European Union with ten new Member States in 2004 adds fresh spices to the principles underlying the EC law on the Internal Market. It raises again principal issues related to workers' rights and fair competition. It reintroduces a social reality where a crucially wider gap in the standard of living and income levels now exists within the Internal Market. Stating this fact does not imply criticism of any of the new Member States. I am amongst the most keen to look at means of blocking any possibility of exploiting the workers and employees of those Member States. On the other hand, as the Swedish Laval case proves (explored in Chapter 4), such attempts occur all the time.

This change in the overall economic reality of the Internal Market may have legal repercussions, too. In any case it justifies reducing the scope of this study to posting of workers in the framework of the free provision of services. I discuss the free movement of workers under Article 39 EC only for demarcation purposes or as a reflection to the reasoning of other scholars. On the other hand, I do not deal with the transitional provisions relating to the posting of workers under Articles 49 and 50 EC, except occasionally. In that specific framework, transitional provisions cover only Austria and Germany, and even in that framework the essential differences in standard of living and costs will remain long after 2011, which is the foreseen absolute end of any transitional provisions.

However, the highly important legal and political feature within the social dimension in the free movement of services is the Posted Workers Directive (hereinafter also 'PWD').² There is no need to explore it from Alpha to Omega because the doctoral dissertation of Eeva Kolehmainen a priori does this.³ She covers the Directive in a first English monograph, with the experience on case-law gained up to 2002. This reasoning equally tries to present the essentials in the PWD (based on my own

¹ See the scientific serial *Work Life in Transition* 2005:11 of the Swedish National Institute of Working Life.

² Officially it is Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. The author had the opportunity to be involved for several years in its preparation as a lobbyist in the European Federation of Building and Woodworkers (EFBWW).

³ Eeva Kolehmainen, *The Posted Workers Directive: European Reinforcement of National Labour Protection*. European University Institute, 2002. Accordingly, the dissertation of Ulla Liukkunen discusses the PWD with some 77 pages: Ulla Liukkunen, *The Role of Mandatory Rules in International Labour Law; A Comparative Study in the Conflict of Laws*. Talentum, Helsinki 2004. She looks at the Directive through the framework of the present Rome Convention (hereinafter also 'RC'; OJ L266/1, 9.10.1980) on law applicable to contractual obligations.

experience in its preparation) but obviously with more emphasis on its position in the legal context dominated by the Treaty. Besides, I discuss new judgments or those given perhaps minor attention by Eeva Kolehmainen or other PWD issues that I feel are worthy of discussion. My focus is by definition on the construction industry, which in many countries also covers collective agreements concluded within others sectors, such as the metal industry. However, the principles formed concerning construction are normally and naturally widely transferable to other sectors.

My leading idea is to discuss the interaction and dependence of economic and social factors that the Preamble of the Directive solemnly declares in its fifth Recital. In other words, in the field of ideas the aim is to discuss (i) the basic fidelity of this description (the marriage of prudence between the economic and social factors), (ii) means of trying to fulfil this requirement in implementation and enforcement, and (iii) shaping the overall role of the PWD in the structure of the EC law, more particularly in the development of EC Labour Law. Under (i) I try to keep in mind the Internal Market after the enlargement of the EU. Under (ii) I try to avoid jumping too deep into the normative and practical jungle of details (and discuss substantively only the German and Finnish national law). Under (iii) my thesis is that making this kind of competition-bound labour law was in the final analysis a political and legal necessity.

In more practical terms the first Chapter covers the preparation and main contents of the PWD. It is essential to view the PWD as an extension of the case-law since the judgment *Seco* in 1982. I also try to show the necessary details in the development of the right of the Member States to extend their laws and collective agreements to workers posted temporarily into their territory. I further present the positions of scholars in various Member States on the essence of the PWD. The core of this Chapter, also serving the reasoning in my Chapters II and IV, might still be to present the overall framework of labour law restrictions on the free provision of services as laid down and demonstrated in judgment *Arblade*.

The second chapter covers the wage liability of the principal contractor in enforcing the minimum wages of the posted workers, subject to the preliminary ruling in case *Wolff & Müller v. Pereira* in October 2004. The debate in the German doctrine before the judgment, and the argumentation of the principal contractor, provide us with a useful mirror in assessing the legal status of the liability in the light of the PWD. It equally helps in determining the role of the PWD under the Treaty. As is the case with all directives, it has to comply with the Treaty (and its interpretations); but on the other hand, as based on the Treaty, the PWD legitimises further state measures that interfere with the market mechanism, such as the wage liability.

The third Chapter deals with the definition of the minimum wages concerned. It shows the direct link between the highly 'integration-ideological' level of the PWD and the grassroots where the wages consist of a variety of historically and culturally determined factors. Definition of the minimum wage was subject to a preliminary ruling in the recent infringement case *Commission v. Germany* where the ECJ gave its preliminary ruling in April 2005. It includes certain formal rewriting of the Treaty interpretation that forms the basis for the application of the PWD, showing more clearly the role of the proportionality assessment in this context.

The fourth Chapter addresses the very ‘cat on the table’, the issue that by the right to strike in the free provision of services has jumped into the European labour law debate. In April 2005 the Labour Court of Sweden decided to ask for a preliminary ruling in a posting case (*Laval*) that will likely form the basis for the right to strike in EC law. It also includes reasoning on the status of prior international agreements binding the Member States (Article 307 EC) and even general international law. The former provision is little discussed in the doctrine, the latter seems to be a wholly innovative step in European labour law, generated by the need, arising daily, to try to cover the relevant legal aspects in this challenging issue.

I do not discuss the Draft Directive on Services in the Internal Market (DSIM) at all. I clearly see, of course, the devastating effect that the Commission’s original proposal would have had, especially on the control of working conditions, and many other problems besides.⁴ However, time and space is limited, the purpose of this particular piece of research work is to analyse the past and present EC law while the whole DSIM still remains a draft.

The role of the ECJ is central to the lengthy legal development of this whole framework towards a more mature European Labour Law. In a preface this would amount to a need for special thanks. In ending an introduction it is enough to ‘warn’ the reader that this reasoning does not include any separate section detailing the evidence in support of my statement on that role (apart from some general remarks in section 3.4). It is common ground as all my chapters show.

⁴ On this, see the presentation of Professor Niklas Bruun (Employment issues, memorandum) at the public hearing on the Proposal for a Directive on Services in the Internal Market of the European Parliament on 11 November 2004; www.europarl.eu.int.

Chapter I

Posted Workers Directive in the Treaty Framework

1.1 The Directive and the Rome Convention

The Rome Convention (RC) is not of little importance here. However, my principal focus is the balance between fair competition (economic) and guaranteeing the rights of workers (social); a reasonable and fair application of the RC does not justify it being the most suitable *general* framework. The PWD is in a legal-technical sense supplementary to the RC, but it takes precedence over the RC in any possible conflict, as Article 20 RC states. Finally, the applicable law is by definition important with respect to the cross-frontier provision of services, but any deep reasoning would differ depending on which one is the starting point, PWD or RC. With respect to work contracts, the RC is usually more significant in the case of executives and experts posted in minor numbers or just individually to other Member States while the PWD is more important in the case of blue-collar workers and technicians posted in larger numbers. The on-going work on replacing the Rome Convention by an EC regulation does not change this general approach.⁵

A separate issue that justifies establishing the PWD-RC relationship this way round rather than other way round (RC – PWD) is that by so doing collective agreements can be handled much more easily and more appropriately. In concluding collective agreements covered by the PWD the parties consider (or at least they should consider) their impact in the framework of the Directive but they hardly dream of the RC. Finally, regarding issues not covered by the Directive (like dismissal protection) the legal value of the RC increases essentially.

An essential difference between the two approaches is that the PWD is supposed to have, when implemented properly, a quasi-automatic and sanctioned effect on employment relationships whereas the RC mainly concerns the decision-making of the courts. More precisely, it aims at solving problems arising from *conflicts* of the law applicable. The RC has the freedom of choice as its starting point whereas the Directive means compulsory changes in the law applicable, guaranteed finally by all of the force the directives have under EC law. This also means that the home state courts must apply the host state law and collective agreements (with higher labour standards) covered either by the Directive directly or by the implementing national law.⁶ Under the RC the home state courts have discretion over this aspect.

⁵ See the Green Paper on the Conversion of the Rome Convention, COM (2002) 654 final.

⁶ This way and without reservations also explains Paul Davies, Posted Workers: Single Market or Protection of National Labour Law Systems, CMLRev. 34: 571-602, 1997, pp. 578-9. Kolehmainen first denotes that she is 'inclined' to share this opinion but then anyway states that it would depend on the national implementation law, op.cit. 89-90. There was no intention to treat the workers' claim differently depending on the forum they chose: home or host state court. The forum guaranteed by Article 6 PWD is clearly enacted as a provision *improving* or adding protection. Interpreting the national law in conformity with EC law à la judgment Pfeiffer, C-397-403/01, judgment of 5.10.2004, nyr, also leads to the same conclusion. Of course, Article 7(1) RC is a backdoor to arrive at the same conclusion.

1.2. The Framework in the Treaty

1.2.1 Relation to Free Movement of Workers

The PWD has its legal basis in Articles 57(2) and 66 (now 47(2) and 55) EC. Nevertheless, it must be interpreted in the light of present Articles 49⁷ and 50 EC. It essentially realises the provision in Article 50(3) EC, according to which the temporary provision of services in another Member State is allowed under the same conditions as those applicable to providers established in that State. As to the legal basis, a leaning towards the free movement of workers is natural.⁸ Article 48 EC was several times proposed as being the necessary legal basis for the instrument but the Commission always firmly rejected it. One reason for avoiding Article 48 was to reject Article 100, too, and thus keep the Directive under qualified majority voting (with the European Parliament in the co-decision position), notwithstanding the British criticism. A more formal ground was the decision that had already been made in judgment *Webb* in 1981 where the full Court stated that even the pure hiring-out of manpower was to be regarded as falling under the free provision of services.⁹ ‘EC constitutionally’ the location of the Directive under the Services Chapter of the EC Treaty fits well with the fact that the PWD de facto also regulates competition between undertakings. As an alternative the Social Chapter of the Treaty, for regulating with its accent on working conditions, did not offer a sound legal basis in 1996 (being of pre-Amsterdam era).

However, a closer look at *Webb* reveals how the Court found that

‘...agencies for the supply of manpower may in *certain circumstances* be covered by the provisions of Articles 48 to 51 of the Treaty and the Community regulations adopted in implementation thereof.’¹⁰ (italics by JH)

The Court did not define what those ‘certain circumstances’ might be.¹¹ However, a reference to ‘Community regulations’ clearly means e.g. Regulation 1612/68/EEC which safeguards the equal treatment of national and cross-border workers, including remuneration. Furthermore, there was also an element of protection against social

⁷ Case C-60/03 *Wolff & Müller v. Pereira Félix*, judgment 12.10.2004, paragraph 45, nyr.

⁸ Another adjacent legal sphere is public procurement. It includes, since the directives Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, a social aspect of its own. However, I pass it here. The author aims at publishing a separate article on social dimension in competition rules.

⁹ Case 279/80 *Webb* [1981] ECR 3305, paragraph 10.

¹⁰ *Ibid.*

¹¹ One example might be transition periods in an accession Act. E.g. in *Rush Portuguesa* the Court stated that hiring-out of manpower (from Portugal) could be against such a period in the Portuguese-Spanish Accession Act. See *Rush Portuguesa*, paragraphs 16-7. It is, anyway, difficult, if not impossible, to find relevant substantive limitations for the principle of equal treatment, if it is looked at from the perspective of the rights of the workers concerned.

dumping in the sphere of free movement of workers. Namely, in an infringement case the Court asserted in 1974, as follows:

‘The absolute nature of this prohibition [against discrimination], moreover, has the effect of not only allowing in each state equal access to employment to the nationals of other Member States, but also ... of guaranteeing to the State’s own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law, since such acceptance is prohibited.’¹²

The meaning of this passage is completely clear: the national labour force shall not suffer from cheap foreign labour. In practice, e.g. on a construction site, it is impossible to justify that those posted, i.e. those removing a priori on the initiative of an employer, should be less protected than those (work mates) removing but using their own fundamental right to free movement. There is no such justification. And, on a more practical scene again, experience shows that abuses are crucially more frequent where there is an ‘employer’ (sometimes a letter box company) posting the workers abroad.

Summing up, the free movement of workers is another legal framework whose rules may apply to posted workers only under ‘certain circumstances’. I claim that this aspect is relevant at least with respect to issues falling outside the hard core of Article 3(1) PWD. It is well defensible that the rules in free movement of workers are of secondary application and are of clear interpretative value in posting situations. I will come back to this *infra*.

Article 39 (ex 48) EC has shown up in a posting context in case-law after *Webb* at least in the following cases: *Finalarte*, *Rush Portuguesa* and *Vander Elst*.¹³ In case *Finalarte* it was, indeed, in all the four questions of the referring court, Arbeitsgericht Wiesbaden, Germany. Companies *Finalarte* and *Portugaia* referred to it by maintaining ‘that the chances of workers being taken on and posted abroad are reduced to the extent that an employer may be deterred, as a result of the extension of the paid leave scheme, from exercising its freedom to provide services by pursuing activities in the Federal Republic of Germany’ (paragraph 21 of judgment *Finalarte*). The ECJ stated that the posted workers

‘...do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work’ (paragraph 22 of *Finalarte* that referred to paragraph 15 of *Rush Portuguesa*).

The ECJ then ruled that Article 39 (ex 48) EC did not apply (paragraph 23 of *Finalarte*). This labour market concept in the posting of workers, as used by the ECJ,

¹² Case 167/73 *Commission v France* ECR [1974] 359, paragraph 45.

¹³ Case C-49/98 *Finalarte v ULAK* [2001] ECR I-7831, paragraph 22 (hereinafter referred to as ‘*Finalarte*’); case C-43/93 *Vander Elst* ECR [1994] I-3803, paragraph 21; case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 15.

requires some critical comments. First, in *Rush Portuguesa* the Court added immediately after the above statement that

‘...an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State.’(paragraph 16)

Thus, the labour market concept itself was twofold. Second, in *Rush Portuguesa* and in *Vander Elst* the concept was used in assessing the need to have work permits for the posted workers. However, it is difficult, if not impossible, to find such a reason to be valid after the adoption and entry into force of the Posted Workers Directive (PWD). Further on, the distinction made between posted workers who return back to their home (or living) state and those who do not return is artificial. In that thinking a worker moving on his own initiative for one day to the host state enters its labour market while a worker posted for a ten years’ project does not. Moreover, freely moving workers may also return home, which for logic’s sake should separate them from the labour market of the host state. Nobody claims it is so. In sum, it would be logical to acknowledge that at the latest since 1992/3 the internal market prevails (with the transitional exceptions, only) and that there is just one labour market of the Community within which workers are posted.

However, while the principles established under free movement of workers, equal treatment in particular, can for good reasons be applied as secondary arguments to the posting of workers under the free provision of services, the latter in any case forms a legal framework *sui generis* in the EC legal order. Later we will also see how labour law (rights of posted workers) has to be interpreted as being linked to the yardsticks and ways of reasoning within the free provision of services whether we like it or not.

1.2.2 Pre-Directive Case-law on Posting

Under this heading I will pick up from the cases concerned only issues that are directly linked to the basic balance between fair competition and workers’ rights in the form of extending the national minimum wages to cover posted workers as well. I see it as appropriate to cover under this heading the cases dealing with events that occurred before the Directive became compulsory, i.e. prior to 16 December 1999.

For the first time the ECJ confirmed that the possibility of extension was compatible in principle with EC law in judgment *Seco v. EVI* in 1982. This confirmation was not just any minor obiter dictum, but it was directly related to the main proceedings dealing with contributions for law-based social security in a posting situation. Luxembourg wanted to legitimise the offset of a competitive advantage gained by service providers from other Member States in paying wages lower than those fixed by law or collective agreements in Luxembourg. The offset Luxembourg made by imposing its social security contributions on those service providers. The offset issue was incorporated into the second question subject to preliminary ruling. The crucial point is that the issue reveals entirely opposite views linked to the very nature of the internal market. Namely, AG VerLoren van Themaat asserted as main grounds for his answer to the second question, as follows:

‘It is one of the fundamental features of the Common Market, which is to be attained *inter alia* by the freedom to provide service, that when providing services in another Member State any employer may in principle make use of the cost advantages existing in his country, including lower wage costs, under the conditions of undistorted competition which constitute another objective of the Treaty.’

The full Court, while it (like the AG) rejected the offset argument as such, confirmed the opposite view on the contents of the Common Market, i.e. that

‘It is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means.’¹⁴

Was this statement, the contents of which can be described as extension right or possibility, an example of (law-making) judicial activism? Certainly. *First*, it was judicial activism in the sense that it was not a necessary step in rejecting the offset argument. It would have been fully possible to reject it simply by stating that the argument did not represent overriding reasons of general interest justifying restrictions on the freedom to provide services. That doctrine was already in use at that time. However, the Court used this statement as a crucial part of its reasoning by concluding, in the same paragraph, that the offset was not of appropriate means as it disregarded the contributions paid in the home state and it resulted in no social security benefit whatsoever for the workers concerned. Furthermore, a case-related feature was that had the Court rejected the offset argument without stating the extension right, the obvious risk would have been to face arguments of or at least uncertainty about the Court perhaps endorsing the connotation which AG gave to the Common Market in his grounds. *Second*, the Court found the extension right as ‘well-established’ without being in this sense too much more elaborate than AG with his ‘one of the fundamental features of the Common Market’. The Court did not refer to any precise provision(s) in the Treaty, an inferred purpose of the ‘fondeurs’ of the Community, case-law (wages were not present in *Webb*, decided in 1981) or any division of competences between the Community and Member States. Its simple tool was a ‘well established’ interpretation’ of ‘Community law’, which, however, is notoriously something broader than the ‘Common Market’. ‘Community law’ thus also includes the leading articles 2 and 3 EC, as well as the Social Chapter of the Treaty. The Common Market connotation of Advocate General was in obvious ideological contradiction with the principle of upwards harmonisation, a presumed (partial) consequence of the functioning of the Common Market, enshrined in Article

¹⁴ Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral v EVI* [1982] ECR 223, paragraph 14. As is shown in my reasoning that follows this passage, we must read and understand it (the extension right) in the light of the opinion of Advocate General. Indeed, ‘[i]n important cases the opinion may be of great assistance to the reader trying to understand the full consequences of the Judgment’; Ole Due, *Understanding the reasoning of the Court of Justice*, in Rodríguez Iglesias et al. (éd.), *Mélanges en hommage à Fernand Schockweiler*, Nomos, Baden-Baden 1999, p. 79, *in fine*.

117 EEC. Anyway, the argumentation (see e.g. the position of Dörfler in footnote 72, *infra*) 23 years later with the Common Market connotation of Advocate General proves that it was essential for the ECJ to state the extension right. In this sense it is appropriate to qualify the extension right as a kind of imposed judicial activism.

In *Rush Portuguesa* the ECJ (as a Chamber) repeated the extension right in 1990 (without the reference to ‘minimum’ wages), again as an obiter dictum while ‘in response to the concern expressed in this connection by the French Government’.¹⁵ The main proceedings dealt with administrative conditions for posting, namely work permits. In *Vander Elst* the ECJ in 1994, this time sitting in plenum but again as an obiter dictum, repeated the extension possibility, however, now referring to ‘minimum wages’ (established by law or by collective agreement).¹⁶ This issue hardly signified an intentional change in relation to *Rush Portuguesa*. The change in wording was anyway taken into account in writing the Posted Workers Directive.¹⁷ More important, however, was that the repetition of the extension possibility took place in a case between two Member States with a generally speaking similar socio-economic level. Mr. Vander Elst posted his Moroccan workers, resident in Belgium, from Belgium to France. Furthermore, the Court repeated the extension possibility in the circumstances that it described, as follows:

‘25 As the Advocate General has rightly observed in paragraph 30 of his Opinion, irrespective of the possibility of applying national rules of public policy governing the various aspects of the employment relationship to workers sent temporarily to France, the application of the Belgian system in any event excludes any substantial risk of workers being exploited or of competition between undertakings being distorted.’

The qualification of the Belgian *system* is noteworthy, as is its assessed consequence, avoidance of workers being exploited or competition being distorted. Typical features of the Belgian system are e.g. the sectoral social funds based on collective agreements and a strict approach of the state to guarantee for its part the rights of workers.

However, the ruling in *Vander Elst* found its opponents (i.e. some of the construction employers concerned) who wanted to provide services with the wages of the home state. They advanced this neo-liberal argument and interpretation of the Treaty, *inter alia*, in the cases *Arblade*,¹⁸ *Finalarte*¹⁹ and *Portugaia*.²⁰ In *Arblade* they ‘anchored’ it on judgment *Bond van Adverteerders and others v The Netherlands State* where the Court confirmed that purely *economic* aims cannot constitute grounds of public policy

¹⁵ To give the official name of the case: Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417, paragraph 18.

¹⁶ Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* ECR [1994] I-3803, paragraph 23.

¹⁷ See section 1.3.4, *infra*.

¹⁸ Joint cases C-369 and 376/96, *Arblade and others* ECR [1999] I-8453. This French company had works in Belgium and pointed out that it had followed the French legislation. Besides, it held that the Belgian obligations (including the obligation to pay the Belgian minimum wages concerned) were against the Treaty; paragraph 22 of the judgment.

¹⁹ Joint cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte* ECR [2001] I-7831.

²⁰ Case C-164/99 *Portugaia*; ECR [2002] I-787.

within the meaning of Article 46 (ex 56) EC, thus grounds to restrict the freedom of cross-border provision of services.²¹ The case dealt with advertising on TV. However, the ECJ in *Arblade* confirmed the extension principle, as established in *Seco* and followed in *Rush Portuguesa* and *Vander Elst*.²²

In *Finalarte* even the referring court, Arbeitsgericht Wiesbaden, clearly lent towards this neo- or ultra-liberal employer argumentation basing itself to a considerable extent on the corresponding German doctrine that I explain below in section 1.3.5. The national court asserted, according to Däubler, that both the German national posting law (*Entsendegesetz*) and the Directive infringed Article [ex] 59 EC. It found that the extension of collective agreements in the building sector rendered the activities of a foreign service-provider less advantageous. According to the court, this restriction cannot be justified by overriding requirements of interest. In fact, the court had doubts whether protection against competition by lower wages could ever meet that condition. This reasoning *de facto* challenged the previous case-law *Seco*, *Rush Portuguesa* and *Vander Elst*.²³ Däubler heavily opposed this reasoning of Arbeitsgericht Wiesbaden, alone in the doctrine published in English so far as I am aware, by referring both to the same conditions for foreign service providers, enshrined in Article [ex] 60(3) EC, and to [ex] Article 91 EC concerning dumping within the common market. Däubler even referred, with logical grounds, to equal treatment under free movement of workers, hence to Article 48(2) (now 39(2)) EC, and to Article 117 (now 136) EC that refers to upward harmonisation ('...*harmonisation while the improvement is being maintained*'). He stated that 'A competition based on wages being 50% or 30% of those which are normally paid in the host country is just the contrary of 'maintaining the improvement''.²⁴

The ECJ in *Finalarte* did not have to repeat the essential precedents' *Seco*, *Rush Portuguesa*, *Vander Elst* and *Arblade* validity, as to the extension possibility in general. The main proceedings dealt only with the social fund procedure in paying holiday remuneration. The imposition of the social fund procedure of the host state in paying the holiday remuneration was accepted with the final condition that those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection (paragraph 42 of *Finalarte*). However, the *Finalarte* judgment was built upon the principles confirmed in *Arblade*.

In *Portugaia* the main proceedings dealt with a sum of some 68,000€ as outstanding wages according to the national minimum wage applicable. The company opposed

²¹ Case 352/85, ECR [1988] 2085, paragraph 34. The references to the disqualified economic aims in *Finalarte* (para 39) and *Portugaia* (para 26) are given in a context very different from that present in *Bond van Adverteerders*. Presenting them anyway shows that the Court always considers the free movement aspects, too.

²² See paragraph 41 of judgment *Arblade*. In *Portugaia* the Court (a Chamber) naturally followed this line (see paragraph 21) but clearly as a lapsus referred to paragraph 33 of *Arblade* that deals with abolition of restrictions on free movement of services.

²³ Wolfgang Däubler, *Posted Workers and Freedom to Supply Services*. Directive 96/71/EC and German Courts, IJL September 1998, Vol. 27, pp. 264-268, especially 265. – See that judgment *Arblade* was not in the national court's reasoning in *Finalarte* because it was just a pending case at that time.

²⁴ *Ibid.* - The Treaty of Amsterdam repealed Article 91, and what is left of this protection against dumping in the Treaty is Article 96 (ex 101).

paying this sum to the (German) state. This implied a claim that it was sufficient for it to comply with the home state wage rules. The proceedings were intended to order recovery of this pecuniary advantage obtained through a refractory conduct according to the German special administrative procedure ‘Ordnungswidrigkeit’ (Law on Regulatory Offences). The referring court had again doubts about the compatibility of the German minimum wage rules with the Treaty.²⁵ More precisely, it asked whether the grounds of the national law, the aim of protecting the national construction industry and the reduction in national unemployment for the purpose of preventing social tension, were consistent with Community law.²⁶ The ECJ ruled that the expressed purpose of the national law was not enough as such to render the national law incompatible but it did cause a closer scrutiny in that respect.²⁷ Otherwise *Portugaia* was a natural extension of the previous case-law.

In concluding the discussion about this question in the case-law, namely concerning the basic protection against competition from other Member States with lower wages, one may state that the answer is consistent and settled. The extension principle has been valid in cases that concern events that occurred before the Directive became compulsory, on 16 December 1999. Furthermore, it is justified to note that on this broader angle, the basic approach against social dumping or low wage competition, the Directive itself is as a balance-making instrument just a natural extension and confirmation of the previous case-law.

Another aspect to consider is that the Court in this pre-Directive case-law only in judgment *Vander Elst expressis verbis* stated the requirement of fair competition between undertakings on a cross-border, i.e. European level. Impliedly this requirement was reflected in all judgments establishing the extension possibility. In *Portugaia* the competition aspect was expressed in the grounds of the national law which were twofold. The grounds referred to both the protection of national industry (undertakings) and unemployed German workers. This only indirectly implies a European competition aspect.²⁸

1.2.3 Labour Law Restrictions under the Treaty; *Arblade*-Test

The labour law restrictions on the free movement of services do follow the overall conditions developed by the case-law. A background factor is that Articles 49 and 50 (ex 59 and 60) EC are directly applicable after the transitional period until 1970, thus

²⁵ See paragraph 12 of the judgment.

²⁶ Ibid, paragraph 13.

²⁷ See paragraph 29 of the judgment: ‘As the Court has already held, it is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures which it has adopted (Finalarte, paragraph 42).’ – I come back to this in explaining the social fund system as part of the control policy, section 3.5, *in fine*.

²⁸ As such the idea of protecting workers against unfair competition with cheap labour is no novelty in EC law. See the infringement case partially cited at footnote 12, *supra*. As to judgment *Portugaia*, see i.a. footnotes 20-22, *supra*, and 55, *infra*.

they are also possible to invoke validly before national authorities and courts.²⁹ Article 49 EC requires, following Article 3(c) EC, the abolition of restrictions on free movement. Article 50(3) EC grants the service provider the right to move temporarily to another Member State ‘under the same conditions as are imposed by that State on its own nationals’. The necessary elaboration of the conditions applicable comes from the case-law. A pre-question naturally is, whether there is any restriction on the free provision of services in nationally applicable terms and conditions of employment. I take it for granted here that conditions which are more favourable in the host state generally form a restriction, as they make the posting of workers less attractive.

In *Arblade*³⁰ the ECJ in a plenum made obviously the last coherent positioning of the conditions for restrictions accepted. They have centred on four basic notions or concepts, namely:

- overriding reasons of public interest justifying the restriction;
- mutual recognition (or equivalence);
- objective justification; and
- proportionality.

Thus, in *Arblade*, the Court laid foundations in four steps for the assessment of labour law restrictions on the free provisions of services. I call this the *Arblade*-test. The Court noted how Article 49 (ex 59) EC requires

‘[i] also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.’(paragraph 33).

‘Rendering less advantageous’ may arise even in the case of a relatively small amount of money. However, this is just a prerequisite and the first step in the general justification battery. The Court went on, as follows:

34. Even if there is no harmonisation in the field, [ii] the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, [iii] in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (paragraph 34).

Here the Court notes, after the standard formula of overriding requirements related to the public interest (ii), also the possible equivalence with the home state rules (iii). Double requirements are forbidden. However, these were the second and third steps.

²⁹ Case 33/74 Van Binsbergen [1974] ECR 1299, paragraph 27, confirmed the vertical direct effect of Article 49 (ex 59) EC. Case 36/74 Walrave [1974] ECR 1405 extended it to rules of private law nature (horizontal direct effect). On this, see section 4.2, *infra*.

³⁰ To give the official name of the case: Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96), [1999] ECR I-8453.

35. The application of national rules to providers of services established in other Member States must be [iv] appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.³¹

The last step (iv) sets forth the proportionality test. All of these statements are general justification tests. On the other hand, this test battery is completely developed in case-law.³² Obviously, it was not necessary to present this general admissibility or justification test in a labour law case, concerning wages. On the other hand, the case also involved assessing the host state requirements on keeping the social documents. Next to this, the case shows that labour law does not escape the overall justification test applicable under the free provision of services that is essentially and finally an economic freedom in the Treaty. Thus, the reasoning shows the status of the social dimension (protection of workers) in this originally economic framework.

The Court staked out the status of social (i.e. labour law) in the general legal framework of free movement of services (only) as a continuum of its case-law, as follows:

36. The overriding reasons relating to the public interest which have been acknowledged by the Court include the protection of workers (see *Webb*, [...], paragraph 19, Joined Cases 62/81 and 63/81 *Seco v EVI* [...], paragraph 14, and Case C-113/89 *Rush Portuguesa* [...], paragraph 18), and in particular the social protection of workers in the construction industry (*Guiot*, paragraph 16).

Hence, protection of workers in general may constitute overriding reasons of the public interest required. There is no need to discuss in detail the limits of the concept of 'protection of workers'. In any case, the references to *Seco*, paragraph 14, and *Rush Portuguesa*, paragraph 18, show that it covers pay provisions. Furthermore, the reference to *Webb* shows in principle the coverage of provisions outside pay as well (protection in hiring-out of labour in *Webb*). At the same time, regarding issues under EC Regulation 1408/71 on law-based social security schemes, the home state provisions apply in most cases to posted workers. The reference to *Guiot* confirmed the basic recognition for the special protection of construction workers. This

³¹ The ECJ referred to, in particular, C-76/90 *Säger*, [1991] ECR Page I-4221 paragraph 15, Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32, Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procurati di Milano* [1995] ECR I-4165, paragraph 37, and *Guiot* [1996] ECR I-1905, paragraphs 11 and 13.

³² Within free provision of services, judgment in joined cases 110 and 111/78 *Ministère public and Chambre syndicale des agents artistiques et impresarii de Belgique ASBL v Willy van Wesemael and others* [1979] ECR 35 was the first that operated with the 'general good' justification of restrictions. The case concerned activities of the fee-charging placement agencies. Paragraph 28 referred, besides to 'general good' as a justification, also, and as equal to that, to 'the need to ensure the protection of the entertainer', i.e. the artist placed. Soon after, i.e. in 1981 it was followed by judgment in case 279/80 *Webb* [1980] ECR; its paragraph 19 referred to 'safeguarding the interests of the workforce affected'. On that judgment in a PWD context, see section 1.3.6, *infra*, and in justifying a strike my submission in section 4.9.1, *in fine*.

protection is realised in many countries via social funds established by a national industry-wide collective agreement.

Had the Court rendered *Arblade* before the adoption of the Directive, its Preamble naturally would have referred to this conclusion. This, i.e. paragraphs 33 to 35 (or, to 36 in a labour law context), is what nowadays can well be called the ‘Arblade-justification’ or ‘Ablade-test’. It is elementary to see that these four steps are complementary (they operate in turn). A restriction can be deemed as being incompatible with EC law on just the last step. If the earlier steps are passed that is insufficient to pass the test. The Court naturally also applies this test in post-directive cases, unless the PWD as an elaborating instrument includes precise provisions or incontestable interpretations imposing developments in it. The first post-directive case, namely *Wolff and Müller v. Pereira*³³ shows that the Court applied exactly this formula, i.e. also ‘rules that do not go beyond what is necessary in order to attain the objective’. It did not elaborate or qualify the fourth step (proportionality) with ‘whether the same result can be achieved with less restrictive means’, as the Court did e.g. in paragraph 39 of *Arblade* when applying the test battery in that concrete case. This evolution might be due to the expiry of the implementation deadline of the PWD (in 1999) and the rights and duties thereby established for the Member States. Because even a ‘same result’ is subject to interpretations, this distinction between these two formulas is subtle but real. The ‘not beyond’ formula is less open to undermining labour law elements than ‘same result with less restrictive means’.

Further in its reasoning in *Arblade*, the Court in paragraph 38 acknowledged that substantive protection can be, indeed, must, I claim, be followed by appropriate control. The famous obiter dictum in paragraph 18 of *Rush Portuguesa*, with roots in *Seco*, was the point of reference here, too.

Finally, confirmation of the extension right, as a key element under protection of workers (i.e. public interest criterion (ii)) - in paragraph 41 of *Arblade* (with reference to *Seco* and *Rush Portuguesa*) impliedly meant that requiring higher pay for posted workers did not violate the equivalence criterion (iii). The extension right is finally its negation. Later on *Portugaia* (paragraphs 21 to 30) has shown that (under (ii)) this higher pay must ‘confer a genuine benefit on the workers concerned, which significantly augments their social protection’ (paragraph 29; on this also see footnote 55, *infra*), at least so as to remedy a protectionist purpose of a national law. On subjecting the application of host state’s pay provisions to a proportionality test (iv) *Arblade* did not involve any discussion. It came later in cases *Wolff&Müller* (see especially section 2.2.5) and *Commission v. Germany* (see sections 3.3.3 and 3.4). Here it suffices to sum up that *Seco* established the extension right and *Arblade* anchored it as the answer of the Court to an express question of a national court. It is inherent in the Arblade-test.

³³ See case C-60/03 *Wolff and Müller v. Pereira* [2004] ECR I-9553, explored in section 2.2, *infra*.

1.3. Posting of Workers in EC Law; The Prudent Marriage of Economic And Social Factors

1.3.1. History and Background of the Posted Workers Directive

Posting workers to carry out work in other Member States was not usual in the beginning of the Community. The *travaux préparatoires*, essentially the Spaak-report, only mention posting of personnel.³⁴ However, already in 1972 a first attempt to legislate was published by the Commission, namely a regulation under the heading of provisions on the conflict of law in employment relationships within the Community.³⁵ The Rome Convention of 1980 later partially substituted it, and the other reason to withdraw it was the profound opposition of the British government. The original proposal for the Directive had its roots in the Social Action Programme implementing the 1989 Community Charter of Fundamental Social Rights of Workers. It required governing the working conditions of posted workers.³⁶ A first draft Directive was published in 1991,³⁷ followed by a revised version in 1993.³⁸ The Council reached a political agreement – by qualified majority; UK voted against and Portugal abstained – on the contents of the Directive on 29 March 1996. The most important issue in the ‘adoption saga’, to use this qualification by Eeva Kolehmainen, was always the inclusion or exclusion of a threshold period for compliance with the pay provisions of the host country. The situation was in 1993, before the Commission shortened the period from three to one month in its revised proposal, that of the then 12 Member States. Only Belgium was, according to the Commission, officially against any compulsory threshold period. The European Federation of Building and Woodworkers saw already at that time that obviously at least Denmark, France and Luxembourg would join Belgium. Following national laws adopted in France in 1994, as well as in Germany in February 1996, the situation slowly but consistently turned against any compulsory threshold (‘grace’) period.

The reason to oppose any grace period was simply the need to block any social dumping by cheap labour. Being excessively difficult to supervise any (even a one month’s) compulsory threshold period would have led to structural dumping by exploiting foreign workers. An essential impetus to this turn-around came from the new Member States, Austria, Finland and Sweden. Besides, Sweden anchored its labour market governance model (high importance of self-governed collective bargaining and agreements) as linked to its accession agreement.³⁹ However, an essential element in the preparations was the ongoing and increasing trade union

³⁴ Comité Intergouvernemental Créé par la Conférence de Messine, Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères, avril 21, 1956 (Spaak report) p. 41.

³⁵ Proposition de règlement (CEE) du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l’intérieur de la Communauté; OJ C49, 18.5.1972.

³⁶ See the Action Programme, Part II, para. 2.

³⁷ COM (91) 230 final, SYN 346, 1.8.1991.

³⁸ OJ C187, 9.7.1993.

³⁹ See the Declaration No. 46 by the Kingdom of Sweden on social policy, annexed to the Accession Act of Austria, Finland, Norway and Sweden, OJ C241, 29.8.1994: In an exchange of letters between the Kingdom of Sweden and the Commission, the Kingdom of Sweden received assurances with regard to Swedish practice in labour market matters and notably the system of determining conditions of work in collective agreements between the social partners.

lobby of EFBWW. It first managed to realize a zero-threshold in the construction industry, at the end with the active support of the European Construction Industry Federation FIEC. Second, it managed to gather a de facto blocking minority against Germany's proposal to make only a 'certain' (meaning a lowest possible) wage category as generally binding. The EFBWW found such a provision being discriminatory (even contradicting the Treaty) except in Germany where it was also intended to cover domestic workers outside the normal coverage of the national collective agreement in building and civil engineering; hence in cases where either the employer or the worker was not a member of the respective organisations. The way out was to enshrine in Article 3(1), second subparagraph, that national law or practice defines the minimum wage concerned.⁴⁰ I come back to the definition of minimum wages especially in section 3.4 (in fine), infra.

The position of the European Parliament was consistent from the beginning. It firmly opposed any compulsory grace period.⁴¹ This was its essential and important contribution to this Directive, subject to co-decision procedure following the Treaty of Maastricht.

The role of the Council Presidencies was important in the preparations of the PWD, not the least the role of Professor Tiziano Treu chairing the Council of Ministers, as well as that of Professor Marco Biagi in drafting with him the overall compromise text adopted. Important at the end was also the role of the European Construction Industry Federation FIEC. Due to its firm position in support of the PWD, UNICE who for a long time opposed the directive, in the end reserved any official position. On the employer side at the end the UEAPME also supported the Directive as adopted.

1.3.2 Some Market Aspects Behind the Directive

The rationale behind the Directive also tests the limits of regulation in a market economy. Namely, for the basic proponents of the Directive, such as the European Federation of Building and Woodworkers, the basic justification of the Directive was and is the EC law guarantee given to the applicability of the national collective agreements, in the construction sector, to workers posted temporarily into another Member State. This means, however, just a partial protection in practice. Namely, in most of the Member States the wages paid in practice have been more or less widely higher than those enshrined in the national collective agreements rendered generally

⁴⁰ The countries ready to block the whole Directive regarding this issue were Finland, Sweden, Denmark, Belgium and Luxembourg. Counting on a guaranteed veto cast against any proposal for a directive by UK these countries formed de facto a blocking minority with 17 (+ 10) votes. The issue was important for the German conservative government; it finally lobbied with the formal – although reluctant as such – support of the Commission and a part of the Italian administration. - Securing the qualified majority behind the Italian compromise text became clear when the Spanish government decided to vote in favour.

⁴¹ See e.g. the Legislative Resolution embodying the opinion of the European Parliament on the Commission proposal for the Directive, OJ C72, 15/03/1993 p. 85, and the Resolution on the posting of workers in the framework of the provision of services, OJ C166, 3.7.1995, p. 123.

binding (*erga omnes*) or being that *de facto* (the Danish-Swedish situation).⁴² The influx of a labour force which is paid only or ready to work for the national minimum provisions automatically means a heavy pressure to lower the actual wages that are higher than the minimum. This is an economic fact that has been evident since work rules were made in Hansa-cities hundreds of years ago. However, as it is impossible to protect these higher wages by a national law or by an *erga omnes* declaration of a collective agreement, it is equally impossible on the European level. A notable legal exception is the mechanism of the German *Ortsüblichkeit* that permits a possibility of a special lawsuit on an individual basis, by invoking equal treatment within a site. Another one is in Swedish and Finnish laws that allow industrial action against a non-organised employer for a market salary to be paid to posted workers.⁴³

If one moves from the Hansa era closer to modern times, let us say in the late 19th century, the national trade unions and, thereby, collective agreements started to emerge. An essential reason first for city-wide agreements was the increased mobility of manpower (bicycles, trains, later cars(!)) that challenged the income level of local workers. Later on, the local agreements developed in most Member States to national agreements. A European regulation (the PWD) is a logical further step in this continuum, which is already in some branches, such as in transport, a global dimension.⁴⁴ In this context the exclusion of merchant navy undertakings as regards seagoing personnel from the PWD is not founded at all, while it is extremely difficult to develop any workable alternative to the flag-state doctrine and practice. In the other transport sectors (rail, road, inland waterways and air traffic) the PWD covers national cabotage traffic.

From the point of view of employers the PWD is important because its aim is to guarantee fair competition between undertakings. The recent developments in the German construction industry are a graphic example of this. Until the 1990's the employer side was not interested in protecting the national wage mechanism. The reunification of Germany led to quite a boom in construction, and the national manpower was insufficient. Workers were being posted to Germany from all directions with wages often as low as 30 to 50% of the German minima. When the situation changed, unemployment rocketed and, in addition, this cheap labour by definition pushed down the wage level, even to the extent that the national collective agreement no longer worked coherently as a standard, especially in East-Germany. The joint lesson of the German social partners in the construction sector was to give up partially with *Tarifautonomie*. The independence of the social partners in wage setting, that has its well known historical roots, culminated in Article 9 of the German Constitution (*Grundgesetz*). They accepted minimum wages covering all the workers in the industry in a situation where cheap and black labour flourished and law-abiding

⁴² This is easy to see e.g. in the working condition surveys carried out by the EFBWW during 1990s.

⁴³ As to the right to industrial action, see Chapter 4, *infra*.

⁴⁴ The Chinese stone workers' case from Finland tells how much the world is changing. Namely, a Finnish stonework company ordered 12 underpaid workers posted from China to Finland. The Finnish user company was not regarded as employer. The estimated illegal profit (net) in the form of this underpayment in 17 months was 174,000 €. By charge of the State Prosecutor, a District Court condemned in 2004 the manager to a fine of 1,600 € and confiscated from the company 174,000 €, as diminished by further wage compensations. The case is under appeal.

employers already had deep difficulties. Bankruptcy figures were high, as well. The acceptance of binding minimum wages *erga omnes*, however, happened under the flag of allowing ‘state intervention only as much as necessary’. On the employer side the metal and textile sectors strongly opposed *erga omnes* wages in construction, as did the confederation of employer organisations, Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA). This was in a nutshell the background to the national posting law (Entsendegesetz, AEntG), enacted in February 1996.⁴⁵ Due to the political controversies even inside the conservative government,⁴⁶ it wanted to get the European Directive, besides its own European merits, as political backing for its own contested national law.

The example of the German construction industry, which could be painted in even darker colours, has lost none of its force. Its main lesson today is that when a labour market goes out of control such that free-riders and even wrong-doers influence an essential part of the standard, it is extremely difficult to get the market back under control. The compulsory minimum wages have been in force now for eight years in the German construction industry, with a remarkable degree of control, but even so the industry still suffers from the same problems that it did in the mid-90’s. This experience also reveals an elementary aspect of market control or ‘creating’ labour law, namely the importance of the grass-root level, where the social partners as self-regulating market actors may often bring about effective informal control.

1.3.3 Once Again: Why a Directive?

A citizen may well ask, why was, and is, this directive so important. He might underline the question by referring to the Rome Convention and to the preceding case-law, notably to *Seco*, *Rush Portuguesa* and *Vander Elst*. Furthermore, the Treaty already included its anti-discrimination clause (Article 6 EC, now 12 EC) as well as the equal treatment clause in the free provision of services, namely Article 60(3) EC (now 50(3) EC), that entitled a service provider to provide services temporarily in other Member States under the same conditions as applicable to that State’s national providers. Besides, the Rome Convention supplemented the Treaty. Finally, there was the Directive 91/533 concerning the information to be given regarding trans-national postings longer than one month.

A simplified answer is that the Directive essentially elaborates the regulation (judicial law-making) made in case-law. Next to this, the preceding case-law with respect to wages merely had the status of *obiter dictum* (although a strong one in *Seco*) which in principle could be reversed by later judgments. A directive naturally makes this less likely, if ever possible in this particular case. The PWD was the political confirmation

⁴⁵ For more details, see e.g. Koberski, Asshoff, Hold, Arbeitnehmer-Entsendegesetz, 2nd ed., Beck 2002, p. 9-14. The official position (in the so called Bargaining Committee) of employer organisations of other sectors (metal, textile, etc.) in the process of the *erga omnes* declaration in applying the AEntG of 1996 even led to lowering several times by the social partners in construction industry the wage level concerned. The amendment of the AEntG in late 1998 gave the Ministry the possibility to make the *erga omnes* declaration without the consent of the Bargaining Committee.

⁴⁶ The Liberal-Democratic Party inside the government opposed binding minimum wages and had strong support within the German Employers Confederation BDA.

of the European legislator (the Council and the Parliament) of the case-law. Furthermore, the structural change achieved by issuing a directive was to turn the possibility to extend the wage coverage to an obligation to cover posted workers by national minimum wages set up by law or, in the construction industry, by a generally binding (*erga omnes*) collective agreement. Furthermore, one may maintain that structural means are necessary in any effective implementation and supervision, means related above all to the use of power in the production chain. It is also important to see this (market interferences) legitimising aspect of a directive. This becomes clearer in Chapter II, *infra*, in explaining the liability issue.

The Preamble of the Directive characterised the structure of Article 3(1) PWD as a ‘hard core’ of clearly defined protective rules. It is, however, appropriate to note that in reality the provisions other than those concerning minimum pay and paid annual holidays are of a public law nature.⁴⁷ They would, therefore, be normally applicable to posted workers even without the Directive. On the other hand, the Directive increases clarity, e.g. with the reference to working time provisions of the host state. Such clarity can hardly be harmful. Furthermore, the ‘hard core’ list is of importance while the Member States may impose other provisions (like dismissal rules) on foreign service-providers only under the *ordre public* condition (and respecting the Treaty) in Article 3(10).

When reviewing the ‘adoption saga’ and the essential contents of the Directive, some issues need to be added to the list of reasons justifying the Directive: 1. the special treatment of temporary work; 2. no favourable treatment for companies from third countries; 3. defining the status of a ‘worker’ by the host country law (against bogus self-employment); 4. the establishment of co-operation between the national authorities; 5. recognition of the Danish-Swedish ‘*erga omnes de facto*’ collective agreements; 6. the possibility of covering collective agreements in any sector; 7. the possibility of instituting judicial proceedings in the host state; 8. a kind of definition of public policy (*ordre public*); 9. its elaboration by the declarations of the Council, Commission and Parliament; and 10. the right to strike not being affected by the Directive.

There are still weaknesses and some more or less grey zones. Methods of comparing the working conditions in force in the home and host states are perhaps the most prominent *prima facie* grey area; see Chapter 3.5, *infra*.

⁴⁷ Paid annual holidays are, of course, included in the Working Time Directive (Article 7) that requires roughly said four weeks’ paid leave. National law in most Member States requires – after a certain service – five weeks. The PWD imposes these national holiday provisions on foreign service providers. - Däubler has also paid attention – next to gender equality in Article 3(1)(g) - to ‘other provisions on non-discrimination’ as being difficult to derive from EC law provisions (ILJ 1998, Vol. 27, p. 264-5). Later on the Anti-Discrimination Directives (00/43/EC on ethnic and racial discrimination and 00/78/EC on a general framework for equal treatment in employment and occupation) have set up the requirements that these ‘other provisions on non-discrimination’ (on belief or religion, disability, age and sexual orientation) also apply to posted workers by virtue of those directives.

1.3.4 Raison D'Être of the Directive

It is, of course, the cross-border effect of the Directive on the internal market that makes it legally really challenging. It operates with the basic notions of labour law, such as 'worker', 'pay' and 'collective agreement'. These notions do have earlier European definitions in case-law but decisions especially about the concept and consequences of 'collective agreement' under this Directive are up and coming. Regarding 'worker' the case-law under free movement of workers is quite comprehensive, even though there is no uniform European definition of 'worker',⁴⁸ and regarding 'collective agreement' the judgment *Albany* settled the basics of the status of sectoral collective agreements in relation to EC competition rules. Sectoral collective agreements were found to include inherent restrictions of competition and got a de facto constitutional protection in relation to EC competition rules.⁴⁹ Regarding minimum rates of 'pay' the ECJ has recently decided the first case, namely *Commission v. Germany*⁵⁰ that deals with the definition of minimum wage in the German construction industry. I explore it later in Chapter 3.

The internal market connection of the PWD is manifest. E.g. in the construction and cleaning industries the in-situ wages can be up to a half of total costs. At the same time the PWD manifests the inseparable nature of economic and social. For the employer, wages are primarily costs in a highly competitive market, for workers they are the main, if not single, means of providing for a decent life, to be social human beings. Excessive profits made by exploiting cheap labour are both economically, from the point of view of fair competition, unacceptable and socially unethical. The risk of dumping exists in any sector where workers and employees are posted, and today this may concern even high tech professions and/or production workers. Besides, the issue is also linked to undeclared work, as the German example from the construction sector shows.⁵¹

In publishing its first proposal for the PWD in 1991 the Commission presented in brief its view on the competition landscape and social point of view. It simply asserted that lower wages would distort competition between undertakings and would be from the social point of view 'completely unacceptable'.⁵²

As usual, the internal market effect is laconically mentioned in the Preamble of the Directive; the first Recital notes how Article 3 EC requires removal of obstacles to the free provision of services. The third Recital denotes that 'the completion of the internal market offers a dynamic environment for the trans-national provision of services, prompting a growing number of undertakings to post employees abroad'.

⁴⁸ On this theme, see e.g. Mikko Huttunen's dissertation, *A Comparative Analysis of the Legal Position of Professional Sportsmen under Finnish, English and European Community Law: the Borderlines of Employment*. European University Institute, Florence 2001, *passim*.

⁴⁹ Case C-67/96, *Albany International ECR* [1999] I-5751, paragraphs 59 and 60. For *Albany*, see the references in footnote 264, *infra*.

⁵⁰ Case C-341/02, judgment of 14 April 2005.

⁵¹ See e.g. Gregor Asshoff, *Baubranche: Illegal ist unsozial*, WSI-Mitteilungen 11/2004. Also see the Council Resolution of 20 October 2003 on undeclared work.

⁵² Explanatory Memorandum to the proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final – SYN 346, Brussels, 1 August 1991, paragraph 12.

The fifth Recital then spells out the basic philosophy in the whole directive, as follows:

(5) Whereas any such promotion⁵³ of the trans-national provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;

This Recital needs to be read together with Recital 12 that, with the wording of *Rush Portuguesa*, paragraph 18, declared:

(12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means;⁵⁴

This Recital introduced the extension possibility in the PWD and Article 3(1) enshrines it as the obligation of the host states. The Recital was during the drafting of the Directive the flag of the case-law backing up the Directive. While the Court (in plenum) rendered judgment *Vander Elst* in 1994 referring to *minimum* wages established by law or collective agreement (as the Court did in *Seco*), the Commission kept the wording of *Rush Portuguesa* in its proposal. The reason was to avoid any debate about the PWD possibly intending to set only the lowest wage category (like a ‘minimum of minima’) as binding erga omnes. In *Arblade* (paragraph 41) the Court referred both to *Seco* and *Rush Portuguesa* but used the *Seco* formula (mentioning ‘minimum wages’). Allowing just the lowest wage category to be binding erga omnes by virtue of the corpus text (Article 3(1)) of the PWD was rejected at the end of the preparations. It is *a fortiori* clear that the PWD is intended to allow (in fact, it a priori requires!) the extension of the whole wage scale and other relevant pay provisions concerned, not just a lowest or otherwise reduced category. Anyway, the PWD applies within the framework of the Treaty. This, i.e. the *Arblade*-test, also has its effect on the extension right/obligation, highlighted in peripheral cases.⁵⁵

⁵³ This ‘such’ is one example of the ‘flowers’ in a text subject to many amendments. Indeed, there is no previous ‘promotion’ in the text, justifying the ‘such’ here. It is easier to read the Recital imaginably without the wording ‘any such provision’. Essentially, the promotion refers to the growing number of postings, present in the third Recital.

⁵⁴ This obiter dictum in *Rush Portuguesa* Paul Davies has still in 2002 called ‘a basic error of the craft of judicial decision-making’(!). IJL Vol. 31. No. 3. September 2002, p. 300. See, however, even footnotes 84 and 159, *infra*.

⁵⁵ There might be in future cases where the Court has to assess so to say extreme pay provisions, like a paid leave for 50th anniversary. If it exists only in the host state law or collective agreement, the question arises whether a posted worker is entitled to this paid leave. I take the liberty to not propose any answer here. - In the doctrine Richard Giesen has paid attention to paragraph 29 in *Portugaia* where the Court in the context of the extension possibility required the national courts “to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection.” For this purpose, the ECJ demands a “careful assessment of the alleged benefits conferred on workers”. Giesen, Posting: Social Protection of Workers vs. Fundamental Freedoms? CMLRev. 40: 2003, p. 150-1. Unlike Giesen seems to hint, these requirements do not concern the extension possibility as such (the Court repeated it in paragraph 21) but need to be read in

However, the putting on an equal footing of fair competition and the guaranteeing of respect for workers' rights is declared in Recital (5) and this is the only possibility of creating social justice in a market economy. The economic and social factors are interlinked and balanced, without any precedence being granted to either of them. Article 3(1) PWD puts this into practice, besides being in harmony with Article 50(3) EC which refers to temporary services in another Member State requiring the same conditions as the national service providers.

1.3.5 Some Basic Assessments of the Directive's Raison D'Être

Granting precedence to the economic dimension would obviously mean giving service providers the right to carry out 'temporary' works in other Member States with the pay provisions in force in the home state, that being in line with abolishing restrictions on cross-border services. This line has had several advocates (after Advocate General in *Seco*) in case-law, most importantly the company *Arblade* in case *Arblade* where it 'anchored' its view on the case *Bond van Adverteerders and others v The Netherlands State*. It shows how *economic* aims cannot constitute grounds of public policy (justifying restrictions on free movement of services) within the meaning of Article 46 [ex 56] of the Treaty.⁵⁶ In Germany there has been a lot of criticism of the doctrine since the mid-1990's, also about the conformity of the national law of 1996 (*Arbeitnehmer-Entsendegesetz*, hereinafter also 'AEntG') with the EC Treaty. *Mutatis mutandis* this criticism also addressed the PWD, and its acceptability under the Treaty. On the other hand, many German scholars opposed this criticism.⁵⁷ It is obvious that the further case-law (*Arblade*, *Finalarte* and *Portugaia*) left crucially less room for this type of criticism, and judgment *Wolff & Müller v Pereira Félix*⁵⁸ should normally put an end to it.

During the preparation of the PWD there were scholars in Germany who suggested that, besides the national law (AEntG), the PWD would also be unconstitutional and would not conform to the Treaty. The criticism and questions about the constitutionality of the AEntG were based on the freedom of association that is

the context of the case, i.e. related to the fact that the grounds of the German posting law AEntG reflected even open protectionism.

⁵⁶ Case 352/85 [1988] ECR 2085, para. 34.

⁵⁷ In *Zeitschrift für Arbeitsrecht* 1/2002, Volker Rieble and Jan Lessner 'rank' in their article *Arbeitnehmer-Entsendegesetz, Nettolohnhaftung und EG-Vertrag*, p. 37, footnote 34, as proponents of the criticism – more precisely said as finding the AEntG as not in conformity with the EC Treaty - Gerken/Löwisch/Rieble, BB 1995, 2370, 2372 ff.; Beisiegel/Mosbacher/Lepante, JZ 1996, 668, 671; Eichenhofer ZIAS 1996, 55, 62f.; Strohmaier, RdA 1998, 339ff.; they refer as 'hesitant' ('zweifelnd') scholars to Hailbronner, EWS 1997, 401ff., and Koenigs, DB 1997, 225, 231; as accepting the AEntG being in conformity with the Treaty they refer to Blanke, ArbuR 1999, 417, 422ff.; Büdenbender, RdA 2000, 193, 206; Däubler, EuZW 1997, 613, 614 ff.; Deinert, RdA 1996, 339; Franzen, DZWIR 1996, 89; Hanau, NJW 1996, 1369; Hickl, NZA 1997, 513, 515; Juncker/Wichmann, NZA 1996, 505, 512; Webers, DB 1996, 574, 577. As to Hailbronner's position, in his lecture 'Beeinträchtigung der Dienstleistungsfreiheit durch nationale Meldevorschriften und Kontrollmaßnahmen' (in WieseHügel and Sahl (eds.), *Die Sozialkassen der Bauwirtschaft und die Entsendung innerhalb der Europäischen Union*, p. 75-93, 77) he refers to the non-conformity of the Directive with the Treaty only as a theoretical possibility.

⁵⁸ Case C-60/03, judgment 12.10.2004, nyr. On this judgment, see section 2.2, *infra*.

guaranteed by Article 9 of the Basic Law (Grundgesetz, German Constitution). Thus, the claim was that the AEntG (and the Directive) deprived foreign undertakings of their right to regulate the working conditions of their workers under their domestic law. There was also a case questioning the constitutionality of the AEntG. The Constitutional Court dismissed such doubts/claims in its decision of 18 July 2000.⁵⁹ However, the German government was a firm proponent of the PWD as such, even though there was a remarkable dispute relating to the contents of the EC intervention in the field of pay, notably in defining the minimum wage under the PWD.

Within the German doctrine Volker Rieble and Jan Lessner provide us with a developed argumentation where they conclude that the AEntG and PWD are incompatible with the Treaty. The basic lines of the argumentation are worth a detailed presentation even as a minority position because it tells something important about the legal nature and ‘self-understanding’ of the Community. They base their argumentation essentially on the free movement of workers, i.e. Article 39 EC. They find that in that provision we should also acknowledge a ‘freedom-related’ (freiheitsrechtlich) prohibition of restrictions that the worker could invoke against depriving him of his benefit in wage costs (Lohnkostenvorteil) and his chances of entering the labour market. Such an interpretation seems for them to be given already on the basis of ‘convergence of the fundamental freedoms’. They find that on the other fundamental freedoms a step from prohibition of discrimination to prohibition of restrictions is to great extent fulfilled. As a further argument in the same direction they note the fact that the Treaty does not foresee any harmonisation of substantive working conditions. Then comes their clue: when the approximation should result from the free effect or play (‘Spiel’) of market forces, there must be wage competition (Lohnwettbewerb) in the labour market.⁶⁰ Hence, this line of thought leads to the conclusion and manifests that competition with low wages would be what the Treaty foresees. Their motto is that competition should be completely free, and they do not even discuss the model of a partial restriction of competition that the PWD and AEntG⁶¹ entail, let alone the reference to the same conditions for temporary service-providers from another Member State, enshrined in Article 50(3) EC.

This conclusion, i.e. the requirement of free wage competition, submitted in 2002 just after judgment *Portugaia*, is in flagrant contradiction with the extension right, as confirmed by settled case-law (at that time *Seco*, *Rush Portuguesa*, *Vander Elst*, *Arblade* and *Portugaia*). Accordingly, it contradicts what the Court noted already in

⁵⁹ See case BVerfG - Kammer - 18. Juli 2000 - 1 BvR 948/00 - AP AEntG § 1 Nr. 4 = EzA GG Art. 9 Nr. 69. On this judgment in brief, see e.g. Koberski/Asshoff/Hold, p. 79-80.

⁶⁰ Rieble and Lessner, Arbeitnehmer-Entsendegesetz, Netto-Lohnhaftung und EG-Vertrag. Zeitschrift für Arbeitsrecht 1/2002, pp. 29-89, 46-47. While Rieble and Lessner mention Eichenhofer as one of those who have found the AEntG as unconstitutional (see footnote 57, *supra*), it seems fair to denote that he in his article ‘Binnenmarkt und social dumping’, *Europäisches Unternehmensrecht* 2001, p. 43-59, clearly presents the PWD (although referring only to a minimum wage, p. 49) as concretizing, not prohibiting, the free provision of services. Besides, in the same article Eichenhofer, although advocating in favour of more competition between national social policy regimes (p. 58), anyway at the end takes a clear stand against social dumping (p. 59).

⁶¹ The AEntG does not impose on foreign employers the whole pay scale in the German collective agreement in construction but only two relatively low rates. See section 3.3.1, at footnotes 154 and 155, *infra*.

case *Commission v. France* in 1974: a protection under Article 39 (ex 48) EC against low-wage competition. Article 39 EC does not intend to allow such competition.⁶² Furthermore, the argument of Rieble and Lessner is in flagrant contradiction with the PWD that imposes the extension of national minimum wages (if they exist). However, presenting the argument about Article 39 EC in 2002 shows the in-depth opposition of the market-orientated part of the German doctrine. But this argument is far from all of their thinking. For example, they present, with their market-orientated starting point, what seems to be a coherent development of the whole Arblade-justification test.⁶³ In so doing they, amongst other things, unwillingly admit that minimum wages *erga omnes* would fulfil the criterion of overriding reasons of public interest (Arblade-justification, point (ii)),⁶⁴ but only with difficulty do they, if at all, find it proportionate under the Arblade-justification, point (iv),⁶⁵ due to the protectionist grounds of the AEntG. In any case, the outcome of Rieble and Lessner is to highlight that neither the PWD nor the case-law requires national minimum wages.

The main criticism of Rieble and Lessner is directed at their submission that the PWD, in expressly combining fair competition and rights of workers, would infringe subsidiarity in Article 5 EC and the principle of a limited specified mandate for secondary EC law (*Einzelermächtigung*). This would be due to the fact that ‘these majesty goals can only be achieved/realised according to procedures and requirements foreseen for that’.⁶⁶ It is difficult to take this submission seriously while Rieble and Lessner do not specify which procedures and requirements would be ‘foreseen’ and would respect subsidiarity and a limited mandate. It therefore has the look of collecting general ammunition so as to get rid of the liability of the principal contractor, subject to litigation in case *Wolff & Müller v. Pereira* since 2000 (on this case, see Chapter II). However, a possible ‘extension’ of this passage of Rieble and Lessner would lead to the assertion that only Article 96 EC is a ‘foreseen’ (and, hence, allowed) procedure against intra-community distortions of competition, which is besides an instrument in the hands of the Community.⁶⁷ However, there is nothing in Article 96 EC that excludes an instrument like the PWD. They can coexist, the PWD being *lex specialis* with respect to the posting of workers within the framework of the free provision of services.

⁶² See the case partially cited at footnote 12, *supra*. Rieble and Lessner do not mention this case.

⁶³ Rieble and Lessner, pp. 63-87.

⁶⁴ *Ibid.*, p. 77-8.

⁶⁵ *Ibid.*, p. 86. For completeness’ sake I denote how they also submit that the German minimum wages perhaps infringe the prohibition of a double burden (Arblade-justification, point (iii)), because they also include a ‘construction supplement’. According to Rieble and Lessner, that supplement may only partly be due to circumstances that do not arise in the case of Portuguese workers under Portuguese law, such as bad weather. However, they admit that this supplement may be regarded as a part of the minimum wage if it is seen as historically determined – as the German government submitted in case *Portugaia* (see paragraph 52 et seq. of the Opinion of AG Mischo) - and in that way an integral part thereof. *Ibid.*, p. 80-1.

⁶⁶ *Ibid.*, p. 50. My translation of ‘Diese hehren Ziele können aber nur entsprechend der dafür vorgesehenen Verfahren und Anforderungen durchgesetzt werden.’

⁶⁷ This ‘alternative’ way to combat distortions of competition is elsewhere referred to by Rieble and Lessner, *ibid.*, p. 85. Dörfler (see next footnote) discusses it as well. His conclusion is that Article 96 EC does not seem to be a valid legal base for national posting laws like the German AEntG, p. 183.

Thomas Dörfler's dissertation on the liability of the principal contractor ⁶⁸ follows the line of Rieble and Lessner, although not in all details. However, as to EC law, he does not take any clear stand on the conformity of the PWD with the Treaty but highlights that it cannot bring about any independent mandate for national laws like the AEntG. ⁶⁹ As to the Treaty, he first contends that one could derive, as Däubler and Franzen have done, from Article 50(3) EC a principle of equal pay for equal work (at the same place). A 'direct' counterargument he also finds in the case-law of the ECJ, by referring to the home state principle of free movement of goods and even by presenting (although in a footnote) judgments *Webb*, *Säger* and *Arblade* as reflections of this principle. In reality, it is essential that only *Arblade* dealt with the extension of national wages of the host state and that it confirmed that possibility which had already been established in *Seco* and *Rush Portuguesa*. Reference to free movement of goods is justified for him while the case-law on basic freedoms is 'converging'. ⁷⁰

The non-effect of Article 50(3) EC Dörfler does not ground any further but presents, to pave way for his conclusion on wage competition, a striking bridge in EC law. Namely, he asserts that 'making use of the existing differences in the labour law standards in different member States is unobjectionable (unbedenklich) insofar as the labour rights follow common basic principles and guarantee a minimum standard for the protection of workers.' This is then followed by an unsuccessful salto mortale: 'the Member States have given such a minimum standard on the basis of the Community Charter on Fundamental Social Rights and Directives on minimum protection in safety and health.' ⁷¹ The end of the bridge is to outweigh the equal treatment principle in the free movement of workers while the posted workers do not seek entrance into the labour market of the host state. Already logical, in a way, is the conclusion on wage comparison: viability of wages paid to posted workers should be decided by comparing them only to those payable in their home states. His overall conclusion on wage competition is that a general interest of protection against distortion of competition cannot justify the obligation to pay minimum wages to posted workers. ⁷² Despite these significant conclusions the prognosis of Dörfler was

⁶⁸ Thomas Dörfler, Die Nettolohnhaftung nach dem Arbeitnehmer-Entsendegesetz. Möglichkeit ihrer dogmatischen Einordnung. Prüfung ihrer Vereinbarkeit mit Europäischem Recht (Net Wage Liability under the AEntG. Possibility of Its Dogmatic Incorporation. Test of Its Conformity with EC Law), Tectum Verlag 2002.

⁶⁹ Ibid., p. 153-4.

⁷⁰ Ibid., pp. 196-7. The misleading effect is rather bold in the way Dörfler (ab)uses this case-law, namely by referring to the overall justification of restrictions on free movement of services: they are not justified if the interest concerned is safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (*Webb*, para. 17, *Säger*, para. 15 and *Arblade*, para. 34). Hence, Dörfler here – in this crucial place of reasoning on the contents of EC law regarding wages – completely passes the fact that the ECJ in *Arblade* (para. 41) confirmed the extension possibility of national wages. This is no wonder in the sense that already in presenting *Arblade* as a part of the pre-Directive case-law he makes an identical 'silent move' and mentions only the administrative (or bookkeeping) side of *Arblade*; *ibid.*, p. 105.

⁷¹ Ibid., p. 197; my translation from 'Bei den EG-Mitgliedstaaten ist aufgrund der Gemeinschaftscharta über die sozialen Grundrechte und den Richtlinien über den Mindestschutz der Gesundheit oder Sicherheit ein solcher Mindestschutz gegeben.'

⁷² Ibid., p. 197-8. The preceding analysis, discussing the possibility to exclude wage competition (i.e. delimiting it to output competition ('Leistungswettbewerb')), Dörfler ends up by citing the grounds at the second question in *Seco* of AG VerLoren van Themaat where

(in 2002, after *Portugaia*) that the ECJ one day would find the basic concept of the German AEntG to be compatible with the freedom to provide services.⁷³

Steffen Görres discusses at length in his dissertation the conformity of the PWD with the free movement of services (Article 49 EC) and assesses it in the light of proportionality, ‘promotion of fair competition’, ‘promotion of free movement of persons[!] and services’ and ‘promotion of the social protection of workers’.⁷⁴ He ultimately finds that the PWD follows a recognised goal, i.e. a minimum protection of workers, and is ‘appropriate and suitable’ (‘erforderlich und angemessen’) for securing the attainment of the objective which it pursues. Furthermore, for him, the protection of workers ultimately outweighs the restriction on free movement of services. Hence, he comes to the conclusion that the PWD does not infringe the free movement of services.⁷⁵ There is, however, a strong reservation that Görres illustrates when explaining the AEntG. Hence, the minimum (i.e. the minimum of minima) wages under the AEntG he holds to be compatible with the Treaty but not the extension of the whole wage scale, i.e. the wages for different categories of workers. In this context he wrongly explains, based on a ‘general usage of language’ (‘nach allgemeines Sprachgebrauch’) that the minimum rates of wage in Article 3(1)(c) PWD would mean just the lowest category that due to its ‘internationally compulsory effect’ covers all the workers concerned. He further wrongly maintains that the European legislator would not have been interested in a wage regulation qualified by skills, concrete tasks or setting up of wage categories.⁷⁶ His conclusion is that the present form of AEntG, which makes it possible to extend more than the very lowest possible wage category, would pass the limits (mandate) of the PWD.⁷⁷ Article 3(1), second subparagraph, PWD shows that here Görres is simply wrong. The decision whether only the lowest wage category or some more categories or other pay provisions are extended, depends on the Member States as the unambiguous wording of the PWD states. Anyway, the logical conclusion must be that Görres also finds, next to the AEntG, the PWD to be compatible with Article 49 EC only if the minimum wage

he found the use of cost benefits as a fundamental – and legitimate - feature of the Common Market (quoted in section 1.2.2, *supra*); *ibid.*, p. 193. Dörfler passes the fact that the Court anyway confirmed the extension right of national wages in *Seco* and later in *Rush Portuguesa*, *Vander Elst* and *Arblade*.

⁷³ *Ibid.*, p. 201 and the final conclusions of the dissertation, p. 237 (as a likelihood).

⁷⁴ Steffen Görres, *Grenzüberschreitende Arbeitnehmerentsendung in der EU*, Neuer Wissenschaftlicher Verlag, Wien 2003 pp. 174-221. He maintains that the proportionality test would also be in EC law threefold: suitability/appropriateness – necessity – reasonableness (Geeignetheit – Erforderlichkeit – Angemessenheit). Hence, he asserts that the proportionality test under EC law would be in broad sense (‘weitestgehend’) identical with that under German law; *ibid.*, p. 171. His reference is (in footnote 834) *Schwarze-Holoubek*, EU-Komm. Art. 49, Rn 95 m.w.N. That there is a clear difference between proportionality test in EC and German law, and that the test is only twofold (suitability – necessity) in EC law becomes clear in footnote 131, *infra*.

⁷⁵ *Ibid.*, pp. 220-1 and the Resümee, p. 384.

⁷⁶ *Ibid.*, p. 285.

⁷⁷ *Ibid.*, p. 293-4. As shown especially in footnote 40, *supra*, there was a blocking minority against a directive allowing only the extension of a lowest wage category. See also my explanation on the European way to conceive the minimum wage, section 3.2 (in fine), *infra*. The PWD respects the national notions up to the extent that it does not impose the enactment of minimum wages.

means the lowest wage category. In his thinking the lowest category finally represents a subsistence minimum.⁷⁸

However, Rieble, Lessner, Dörfler and Görres are not and have not been the whole doctrine in Germany, far from it. I would refer (in addition to those in footnote 57, *supra*, who find the AEntG to be compatible with the Treaty) to Richard Giesen whose conclusion about the case-law until *Portugaia* was that the ECJ by and large succeeded ‘in avoiding polarizing statements in weighing social protection and fundamental freedoms.’⁷⁹ Von Danwitz has held, after judgment *Portugaia*, that the ECJ has powerfully blocked with its case-law a race to the bottom. For him (as for me) the integration-related signal of this case-law is clear: the realisation of the free provision of services will by no means lead to a massive dismantling of the social protection of workers. In his conclusions he highlights that it is possible to combine the free market of services and social protection of workers as principally equal factors that limit and set up conditions on each other.⁸⁰ Deinert clearly argues on the same line as von Danwitz and he succinctly finds that the opinions of the supporters and opponents of the AEntG and Directive ‘are based on their individual ideas in relation to the question whether the internal market allows one ruthlessly to exploit comparative cost advantages, or whether restrictions on the use of competition advantages are allowed for reasons of public interest, in particular to achieve social aims.’ I agree with him.⁸¹

There seems to be no equivalent to ‘Rieble and Lessner’ in the French doctrine but rather the atmosphere linked to *Rush Portuguesa*. Thus, the starting point of Marie-Ange Moreau in explaining the Directive is the organisation of socially loyal competition in the EU. She denotes the role of the French national law of 1993 as a point of reference in preparing the PWD and maintains that the PWD elaborates and puts into effect, but does not put into disorder, the mechanisms or concepts used in international industrial relations. It also simplifies the protection of posted workers and shows the importance of the regulation of competition by taking care of the social costs of work.⁸² She also highlights that the PWD may have effects beyond the definition of the status of a posted worker, namely by creating a potential model for

⁷⁸ Ibid, p. 293 where Görres finds how the AEntG (that imposes two wage categories on posted workers) has an impact ‘widely over guaranteeing a subsistence minimum’ (‘eine weit über die Sicherung eines Existenzminimums hinausgehende Wirkung’).

⁷⁹ Richard Giesen, Posting: Social Protection Vs. Fundamental Freedoms? CMLRev. 40:143-158, 2003, p. 152.

⁸⁰ Thomas von Danwitz, Die Rechtsprechung des EuGH zum Entsenderecht. Bausteine für eine Wirtschaft- und Sozialverfassung der EU. EuZW 8/2002 p. 237-244, 244. On the same line is Gabriele Peter under heading ‘Europarechtliche Bedenken gegen das AEntG’ in Gabriele Peter, Otto Ernst Kempfen und Ulrich Zachert, Rechtliche und rechtspolitische Aspekte der Sicherung von tariflichen Mindeststandards, WSI Januar 2003, pp. 34-37; http://www.boeckler.de/pdf/wsi_rechtsgutachten_mindeststandards.pdf.

⁸¹ Olaf Deinert, Posting of Workers to Germany – Previous Evolutions and New Influences throughout EU Legislation Proposals, IJCLIR, Autumn 2000, p. 221. Thus, Deinert de facto also means the argument of the Advocate General and outcome in judgment *Seco*, see section 1.2.2, *supra*.

⁸² Marie-Ange Moreau, Le détachement des travailleurs effectuant une prestation de services dans l’Union européenne. Journal du droit international 1996 No 4, p. 889-908, p. 907.

the trans-national application of collective agreements and by laying the foundations for a concept of a reference wage in EC law.⁸³

The debate in the United Kingdom does not offer many views on which to comment. However, after an analysis of the case-law up to *Portugaia*, Paul Davies denotes how the ‘blanket permission’ given (to extend the laws and collective agreements to posted workers in the obiter dictum of paragraph 18) in *Rush Portuguesa* was overstated. His further conclusion is that the Directive makes the same overstatement as to host-states’ obligations and freedoms. However, his final conclusion is to wonder whether some brave spirit would challenge the legal basis of the Directive because it is ‘incapable’ of promoting freedom of cross-border services. At the same time he finds that it does a good job in protecting host-state employees and, much more controversially, the posted workers themselves.⁸⁴ I venture to assert that Davies himself overstates his case, at least with respect to the PWD. It is true that the obiter dictum in paragraph 18 of *Rush Portuguesa* did not refer to an extension right under the Treaty obligations and that it can therefore be called a ‘blanket permission’. If so, already in *Arblade* the Court in any case placed the extension right in its Treaty context. Furthermore, the PWD elaborated the extension right and operates under Treaty obligations, see especially my explanation on judgment *Commission v Germany* in section 3.3.3, *infra*. Besides, Member States do not have free hands in adding matters to the hardcore list in Article 3(1) PWD but they need to respect the Treaty. Catherine Barnard offered in 2000 a neutral and succinct presentation of the main lines of the Directive. However, she denotes how it imposes an extra burden on service providers. On the other hand she recognises the prevention of social dumping, but by setting up only minimum wage rates; being one the few scholars who have noted, in public, the higher wages that are actually paid in many countries. Hence, she sees that the competitive advantage remains, even though it is reduced by the PWD.⁸⁵

In Sweden Lena Maier raised (in 2000) questions in her dissertation EU, arbetsrätten och normgivningsmakten (EU, labour law and lawmaking powers); first, the relationship between the legal basis of the PWD and the exclusion of ‘wage relations’

⁸³ Ibid. Marie-Ange Moreau refers at the indirect conceptual effect of the PWD to Antoine Lyon-Caen (who chaired the round table where she made her presentation).

⁸⁴ Paul Davies, The Posted Workers Directive and the EC Treaty, *Industrial Law Journal* Vol. 31, No. 3, September 2002, 298-306, 306. In his earlier article ‘Single Market or Protection of National Labour Law Systems?’ *CMLRev*, Vol. 34, 1997, pp. 571-602, Davies expressed perhaps sharper criticism on the same line. However, he also predicted future developments, i.e. elaborating the ‘wholesale justification’ of the extension right in *Rush Portuguesa*, which becomes clear in footnote 159, *infra*.

⁸⁵ Catherine Barnard, *EC Employment Law*, second edition, Oxford EC Law Library 2000, pp. 170-180, conclusions p. 179. As to pre-Directive positions from the United Kingdom, one has to mention Brian Bercusson whose anti-dumping attitude characterizes his description in *European Labour Law*, Butterworths 1996, pp. 397-412, of the developments towards the Directive during the first half of 1990s. However, dealing with collective agreements in the draft directive (the Commission’s revised proposal COM(93)225, OJ C187 9.7.1993) his conclusion was that the draft without proper grounds distinguished CBAs from laws (as also did the directive later, although it left the option to cover CBAs on every sector). He also reminded that judgment *Rush Portuguesa* did not include any such distinction between laws and agreements; *ibid.*, p. 412.

(‘löneförhållanden’⁸⁶) in Article 137(6) (now 137(5)) EC. Second, she also raises the principal questions whether wage differences lead to distorted competition and whether this is an internal market issue that can be remedied under the free provision of services. Regarding the first question, she notes the problems that would have occurred, not the least the exclusion of the United Kingdom, if Article 2 of the Maastricht Social Policy Agreement had been chosen as the legal basis of the PWD. Regarding the second question, she highlights that posting of workers brings the wage differences in a specific way inside a Member State. This is a counterargument e.g. to the statement in the Spaak report⁸⁷ that did not see a Community intervention as being necessary to iron out wage differences. However, the remedy to both types of problems that she has raised, she finds in the indirect transfer of competence that the Member States have accepted by adopting the Treaty with its Articles 57(2) and 66. The outcome is that the Community, based on the Treaty, has the competence to regulate wages. That is what the PWD does, although ultimately via the national pay provisions.⁸⁸

In the Dutch doctrine. Mijke Houwerzijl takes for granted in her recent dissertation the combination of fair competition and worker protection. Accordingly, and given the enlargement of the EU, she sees the most prominent shortcoming to lie in the area of enforcement and she finds a liability clause for the user company to be needed. However, for her, even with its shortcomings the PWD may at least prevent the most severe forms of social dumping.⁸⁹

As to predominantly European doctrine, one has to refer to the (to my mind overstated) warnings of Marco Biagi about social protectionism just after the adoption of the Directive. He, too, took for granted the balance making between fair competition and social rights.⁹⁰ The same point concerns Eeva Kolehmainen who concludes that the PWD is more about protecting national labour law systems and guaranteeing fair competition than about protecting posted workers. Protection of posted workers is for her a by-product of the pursuit of the objective of facilitating free movement of services.⁹¹ In her conclusions Ulla Liukkunen seems to adhere to the same line.⁹²

⁸⁶ See that the Swedish (‘löneförhållanden’) and Danish (‘lønforhold’) versions of Article 137(5) EC do differ structurally from the others as they use this ‘relations’ (förhållanden/forhold) like in the expression ‘industrial relations’.

⁸⁷ See Report of the heads of delegations to the foreign ministers at the Messina conference, 21 April 1956 (Spaak Report), Part One, Title 1, Chapter 2.

⁸⁸ Lena Maier, EU, arbetsrätten och normgivningsmakten, Jure Ab, Stockholm 2000, p. 350-353.

⁸⁹ See Mijke Houwerzijl, ‘De Detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG’ (The Posting of Workers Directive: About the Background, Content and Implementation of Directive 96/71/EC; with English summary). Kluwer, Europeese Monografieën 2005, p. 400-1.

⁹⁰ See Marco Biagi, The ‘posted workers’ EU directive: from social dumping to social protectionism. Bulletin of Comparative Labour Relations 1998, pp. 173-180.

⁹¹ Eeva Kolehmainen, The Posted Workers Directive: European Reinforcement of National Labour Protection, IUE, 2002, p. 269.

⁹² Ulla Liukkunen, the Role of Mandatory Rules in International Labour Law. Talentum Helsinki 2004, p. 224. In her reasoning there are, however, some points that I disagree with, like the statement (p. 177) that the PWD would mean ‘exhaustive harmonisation’ and that most of the matters in Article 3(1) PWD would belong to the ‘field of EC law, which includes substantive harmonisation’. The by far most important matter, i.e. pay, EC law does not

1.3.6 Author's View; Summing up

The author shares the general view of the PWD as it stands, i.e. it achieves a balance between the market freedoms and social aims, although with the remark that the PWD is not neutral in relation to the competition existing before its adoption. Namely, the Directive (rather naturally) allows essential pressure to lower actual wages that often and sometimes even widely exceed the compulsory provisions (mainly in collective agreements) in many Member States. Another issue is whether national law allows the defence of actual wages or the actual wage level (in piecework ordered by the collective agreement but not necessarily guaranteed by it) even with industrial action (as in Sweden and Finland). Besides, the Directive leaves the possible (and obvious, for the new Member States) competitive advantage in social security costs untouched. As to other scholars, the line is clear in the sense that the argumentation on the line of Rieble, Lessner, Dörfler and Görres (representing a 'milder' position by accepting the 'subsistence minimum wages') deviates essentially from the European mainstream. This argumentation is market orientated to the extent that it disregards the social and political realities in the Member States. The EU cannot set up its goals irrespective of these realities. That is the bottom line reason why the ultra-market-minded argumentation finally does not have too many supporters in the legal doctrine, if any, outside Germany (and has been rejected by the ECJ since *Seco* in 1982). As such its existence as a clear-cut minority position illustrates the nature of the European Community, i.e. highlights that it is not a blind product and bearer of ruthless market thinking – that 'labour is not a commodity'. With respect to this issue, the underlying market concept essentially relies on settled case-law that will remain immovable, unless an amendment of the Treaty itself were to be enacted in the opposite direction. Such a u-turn (after the Single European Act and the Treaties of Maastricht, Amsterdam and finally Nice in 2000, the latest thus adopted after *Arblade*) is surely outside the scope of political reality.

Indeed, the gap in wages and costs between the old and new Member States in the enlarged EU once again highlights the crucial line drawn by the Court in *Seco*: posting of workers in the Community is not based on low-cost competition but on a reasonable compromise between the interests of workers and employers, the Posted Workers Directive being the means of enforcing this compromise. Had the Community not issued the PWD in 1996, enlargement would have created massive pressure for such an instrument, with the alternative of the Member States operating independently, by virtue of the case-law. I recall how the ECJ also confirmed the extension right in *Vander Elst* and *Arblade*, i.e. in posting workers between two Member States (Belgium and France) with essentially similar level of wages and other costs in contrast to the gap between the fifteen 'old' and ten new Member States since enlargement.

Some comments are still needed about the PWD as a reflection of the fragile balance between market freedoms and social aims. As background I recall the extension right established in *Seco* and reconfirmed in *Arblade*. The latter established the key notion,

regulate at all unless with the special mechanism in the PWD, and for the other matters (like paid annual leave and working time) minimum requirements have been set by the EC. That is not harmonisation. The PWD is an act *of* the Community but, as to material contents of working conditions, it is essentially labour law *within* the Community.

namely ‘protection of workers’, as capable of justifying restrictions on the free movement of services. It came even closer to workers’ specific interests by recognising the need for special protection of construction workers (paragraph 36, in fine). However, the reasoning in *Webb* (see footnote 9, *supra*) went even further. *Webb* – being the first great ‘labour law judgment’ within services (decided in 1981) and later referred to also by *Arblade*, paragraph 36, next to *Seco* and *Rush Portuguesa* – is, indeed, a graphic illustration of this fragile balance that in the end requires a choice. Namely, the ECJ wrote in *Webb*, as follows:

‘19 It follows in particular that it is permissible for Member States, and amounts for them to a legitimate choice of policy pursued in the public interest, to subject the provision of manpower within their borders to a system of licensing in order to be able to refuse licences where there is *reason to fear* that such activities *may harm good relations on the labour market* or that the *interests of the workforce affected are not adequately safeguarded*’ (emphasis JH).

Hence, the bottom line was that precedence was given to ‘the interests of the workforce affected’. ‘Good relations on the labour market’ may, of course, also cover the interests of (organised) national employers but ‘interests of the workforce affected’ is at the end an independent ground, and, besides, effective already in case of *fear* which is crucially different from any proven effect in future. These lessons from *Webb* are equally as valid in the debate about temporary work, the draft Directive on Services and overall ‘flexicurity’. Their value is by no means diluted by the Court’s later statement (in paragraph 20) on the necessity to take into account the guarantees given in the state of establishment.

Locating the PWD under the free provision of services was natural in the sense that the instrument is heavily competition-bound. However, that competition tie already has a (more or less declared) history of some 23 years (since judgment *Seco*) and it can be predicted that the present legal framework (balance and combination of the interests of workers and employers, finally an interpretation of the core element of the Community, i.e. the Internal Market) will remain in force for a corresponding time span in the future. On the other hand, this location under the free provision of services was necessary so as to come under QMV in decision-making. Besides, issuing the PWD after Amsterdam would have further involved a debate about Article 137 EC as a valid legal base for it, given its paragraph 6 (5 since Nice; I discuss Article 137(5) in section 4.3, *infra*). In any case, the PWD is a mix of economic and social (labour law) values. It includes in Article 3(7) as a typical labour law feature a reference to conditions better than those required by the PWD. Still, given the location of the PWD under the free provision of services,⁹³ a ‘mega-interpretation’ is that these ‘better conditions’ need to comply with Article 49 (and 50) EC, i.e. with the *Arblade*-test. As to the practical applications of this mega-interpretation, in the following Chapters I will show that, outside normal pay provisions, a formal ceiling exists for the host state’s conditions that can be extended to posted workers; it is, however, set

⁹³ I recall that the ECJ already in *Webb* in 1981 (see the explanation in section 1.2.1, at footnotes 9 and 10, *supra*) stated that even pure cross-border hiring-out of manpower *a priori* falls under free provision of services and just secondarily under free movement of workers.

reasonably high and dominated by the concept of protection of workers instead of economic market values.

In sum, the Posted Workers Directive is also a graphic example of the circuitous development of EC labour law. Neither the upward harmonisation of working conditions ensuing from the functioning of the common market (Article 136, third paragraph, EC still uses ‘common’ instead of ‘internal’), nor the approximation of laws under Article 94 – as for other pre-Amsterdam labour law - has worked or been used as presumed in the Treaty of Rome. Thus, seen from its labour law angle, the PWD emerged in a roundabout way, in the end based on a constitutional interpretation of market freedom itself by the Court in *Seco*. It is anyway an integral part of EC labour law while, as to final material contents, it essentially relies on national law.

The Posted Workers Directive, especially as interpreted in the framework of the EC Treaty, is a focal point where the social and economic factors meet. However, these developments within the free provision of services rarely attract attention in discussions on a more general level about the relationship between economic market freedoms and (most often) national social rights. A graphic example is the article ‘Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU’ of Miguel Poiars Maduro, published in 1999. The article, excellent as such, discusses in particular Social Policy Articles of the Treaty, free movement of goods and persons (workers), pay equality (Article 141 EC), non-discrimination (Article 12 EC) and worker representation in European mergers. Comprehensively it refers even to strikes, though just as phenomena, without any discussion on their justification. It comes to the conclusion that the ‘negative’ impact of the European Economic Constitution on social rights has been limited and is a function of market integration and judicial harmonization of national social and regulatory policies, *not the result of a neo-liberal conception of the European Economic Constitution by the Court of Justice*’ (emphasis JH). However, and this is my main point here, he deals with the whole impact of the free provision of services by only referring to national litigants wanting to ‘favour economic freedom and change social policies at the national level’.

⁹⁴ I maintain (expecting, no doubt, that Mr. Poiars Maduro agrees) that the developments in the field of the posting of workers crucially belong to the former quotation above with respect to the ECJ, while the latter is true as such (although it ignores the case flow in the ECJ). Namely, just consider for one moment what the effect would have been if the ECJ in *Seco* (in 1982) had decided (i.e. imposed) to tolerate low-wage competition as a fundamental feature of the common (internal) market, as was proposed by the advocate general. Reaching the extension right (or obligation) via a directive or directly through national posting laws would have been impossible because the service providers would have been entitled by virtue of the Treaty to use manpower with the standards of the home state, and amending the Treaty would require unanimity. The consequences in particular for the crisis in the construction industry in Germany since the early or mid- 1990’s (see section 1.3.2, *supra*) would have been disastrous. This statement relies on the fact that the very unsatisfactory situation still continues, despite the minimum wages (*de jure*)

⁹⁴ Miguel Poiars Maduro, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, in Alston et al. (eds.), *The EU and Human Rights*, Oxford University Press 1999, pp. 449-472. The first citation is from pp. 454-5, the second from p. 455.

applicable there since 1997. The spill-over effect of a ‘reversed *Seco*’ on other areas of EC law would have also been obvious.

However, Poiares Maduro also introduces at the end of his article a discussion about Social Rights and Redistribution, i.e. redistributive justice at the European level. While the discussion proceeds at a rather general level with an EU constitutional perspective (which it is not appropriate for me to comment on in this study), redistributive justice is also intended to reach that ‘among individuals’. I will confine myself here to denoting that the Posted Workers Directive (like the pre- and post-directive case-law) is intended to prevent a redistributive trend or change (‘injustice’ or his ‘rough exploitation’) affecting a worker by paying him less than the minimum established in the host state. It is redistributive justice in this rather limited sense. Its main purpose is to guarantee fair competition amongst domestic and foreign employers. There, too, a safeguard element is evident.

However, as it is intended to have concrete effects even on individual work contracts, the PWD requires further discussion on its implementation. That is the subject of the following chapters.

Chapter II

Liability of Principal Contractor

2.1. General Remarks

A growing feature of the area where the posting of workers is most common, i.e. in the construction industry, has been and remains the practice of subcontracting. It has in construction a threefold history. First, for decades, if not more than a century, specialised companies in sub-sectors, such as the plumbing trade, electrical installation, painting and (nowadays) scaffolding, have acted as subcontractors for principal contractors. Second, a more recent trend is to organise building work using an umbrella-model, meaning that the principal contractor employs workers, technicians and engineers only for the infrastructure (energy, water, maybe cranes, social premises and transport services) of a site whilst everything else is subcontracted. Third, there is a permanent trend to subcontract bulk work, such as cleaning on a site.⁹⁵

During the last few decades we have seen, especially on larger sites, chains of subcontracting stretching to five to eight subcontractors. Growing work-only subcontracting (hiring-out of manpower) is typical in these chains while it also exists in simple subcontracting relationships. Finally, cross-border hiring-out has been growing during the last let's say 15 years, and the income gap between the old and new Member States guarantees its growth in future, too. However, hiring-out received special treatment in the PWD, which was intended to prevent any abuses.⁹⁶

In sum, the prominent and still growing practice of subcontracting explains why several Member States have also realised in one way or another the wage liability of the principal contractor (or a company being the organiser of subcontracting). I will take the discussion of EC law via the German case *Wolff & Müller v. Pereira Félix* where the ECJ gave its preliminary ruling on 12 October 2004.⁹⁷ It merits a detailed discussion because the case reveals essential arguments linked to the extension right and, in particular, in respect of control policy and in the overall implementation of the PWD. It is also the first case decided under the Posted Workers Directive.

⁹⁵ As a practical example I may refer to the site of the Council of Minister's new headquarter (Justus Lipsius) in Brussels during the 1990s. At various times the site board included some 30 to 50 subcontractors and not everyone was listed on the board. To illustrate the temptation to subcontract I refer to the renovation of Berlaymont (the Commission's headquarter) where a German company that specialised in asbestos removal engaged in 1996/7, via subcontracting, some 110 Portuguese workers that were not trained at all for their tasks. Further graphic and actual examples are presented in Cremers and Donders (eds.). The free movement of workers in the European Union, CLR Studies 4 (2004), pp. 48-51.

⁹⁶ Articles 1(3)(c), 3(1)(d) and 3(9) PWD and the Declaration 4 of the Parliament, Council and Commission attached to the Directive; doc. 10048/96 SOC 264, Council meeting of 24.9.1996.

⁹⁷ Case C-60/03, *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix*, nyr.

2.2. Case *Wolff & Müller v Pereira*

2.2.1 Facts and Questions

Under Section 1(a) ⁹⁸ of the German Arbeitnehmer-EntsendeGesetz (law on the posting of workers, hereinafter the 'AEntG'), as in force since 1 January 1999, the 'lead contractor' of building works is subject to the following:

'An undertaking which appoints another undertaking to provide building services within the meaning of Paragraph 211(1) of the third book of the Sozialgesetzbuch [...] is liable for the obligations of that undertaking, of any subcontractor and of any hirer of labour appointed by that undertaking or subcontractor concerning payment of the minimum wage to a worker or payment of contributions to a communal scheme for parties to a collective agreement under the [appropriate provisions of the AEntG]. The minimum wage for the purposes of the first sentence, means the sum payable to the worker after deductions in respect of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay).'

Hence, this provision established the (minimum) wage liability of the principal contractor. Paragraph 19 of the judgment *Wolff & Müller v. Pereira Félix* reveals that the principal contractor is in a position of a guarantor who has waived the benefit of execution (*beneficium ordinis*). Furthermore, the wage liability covers the whole chain of subcontracting, but only with regard to net pay.

This provision was subject to a hectic debate in the Bundestag. However, it was also a political promise of the opposition before the elections in 1998. Given the earlier political and doctrinal debate in Germany, it was clear from the outset that this provision (as a structural factor) would also be tested in the light of European law. There were two possibilities as to the initiator in litigation, namely a worker concerned or the Holiday Fund (ULAK, nowadays called SOKA-BAU). The latter has an independent locus standi under the AEntG concerning holiday pay. Bricklayer José Filipe Pereira Félix took the initiative and brought a lawsuit about the outstanding minimum wage against his employer (subcontractor) and the principal contractor.

The ECJ presented the facts and proceedings in the case, as follows:

9. Mr Pereira Félix is a Portuguese national who, from 21 February to 15 May 2000, was employed in Berlin (Germany) as a bricklayer on a building site by a construction undertaking established in Portugal. The latter carried out concreting and reinforced-concrete work on that building site for Wolff & Müller.

10. By an application lodged on 4 September 2000 with the Arbeitsgericht (Labour Court) Berlin (Germany), Mr Pereira Félix sought payment jointly and severally from his employer and from Wolff & Müller of unpaid remuneration amounting to DEM 4,019.23. He claimed that Wolff & Müller, as guarantor, was liable, under Paragraph 1(a) of the AEntG, for sums in respect of wages not received by him.

⁹⁸ Inserted by Article 10 of the Gesetz zu Korrekturen der Sozialversicherung und zur Sicherung der Arbeitnehmerrechte (Law amending social security and safeguarding workers' rights) BGBl. 1998 I, 18.12.1998, p. 3843. To simplify a bit, I use in the following the expression liability of a principal contractor, or corresponding.

11. Wolff & Müller opposed the claims by Mr Pereira Félix, arguing in particular that it was not liable on the ground that Paragraph 1(a) of the AEntG constituted an unlawful infringement of the constitutional right to carry on an occupation under Article 12 of the Grundgesetz (Basic Law) and of the freedom to provide services enshrined by the EC Treaty.

12. The Arbeitsgericht Berlin upheld the claim by Mr Pereira Félix. The Landesarbeitsgericht (Higher Labour Court), before which the case was brought by Wolff & Müller, partially dismissed its appeal, [⁹⁹] whereupon it appealed on a point of law to the Bundesarbeitsgericht (Federal Labour Court).

Thus, Mr. Pereira Félix sought payment of the minimum wage jointly and severally from his employer ¹⁰⁰ and from Wolff & Müller. The amount claimed (some 2.000€ accrued in less than three months) shows essential underpayment, amounting to social dumping.

The Federal Labour Court (BAG) found that preconditions for establishing the liability of Wolff & Müller as a guarantor were met. It also adjudged that the liability as a proportionate restriction was compatible with the German Basic Law (paragraph 13). Furthermore, the referring court identified practical burdens in enforcing the liability (paragraph 14). It then questioned whether the infringement was justified. It first admitted that the workers got a genuine benefit contributing to their protection (paragraph 16) but deemed its effect limited and burdened by the practical difficulties on the (unlearned) workers' side in enforcing the liability. It then referred to the lessening value of this protection by reduced job opportunities in Germany, due to the liability threat (paragraph 17). Finally, the Bundesarbeitsgericht (who should normally be well aware of the rationale of national (labour) law, up to the political constraints in the legislative process) resorted to the explanatory memorandum to AEntG. The court pointed to its protectionist passages which were, assessed objectively, too, primary considerations behind the AEntG, whereas the protection of posted workers (with a doubled or tripled wage for social reasons) was not (paragraph 18). This reasoning of the BAG had clearly benefited from the argumentation of Rieble and Lessner, as well as Dörfler. ¹⁰¹ I recall that Rieble and Lessner in their article of 2002 as its broad line contested the 'general interest' justification ¹⁰² of the AEntG in EC law with respect to any of its elements. Dörfler had similar severe doubts, although he supposed that the ECJ would find the German AEntG to be compatible with Article 49 EC. However, the essential difference between the BAG and Rieble/Lessner was that the BAG found the proportionality requirement fulfilled whereas for Rieble/Lessner (and Dörfler) the very opposite was the case. ¹⁰³

⁹⁹ The Landesarbeitsgericht accepted the appeal as to overtime bonuses (Überstundenvergütung); see paragraph 8 of the report for hearing.

¹⁰⁰ The proceedings in the ECJ reveal no trace as to the position of the employer. Sometimes they just vanish which is particularly taken into account at least in the Austrian law.

¹⁰¹ Indeed, the BAG at the end of its substantive reasoning (at the end of point VII.3) refers to the conclusions of Rieble/Lessner and Dörfler that the protectionist grounds of the AEntG make the whole law incompatible with Article 49 EC.

¹⁰² See the explanation in the context of judgment *Arblade*, section 1.2.3, *supra*.

¹⁰³ I discuss this argumentation in section 1.3.5, *supra*. Rieble and Lessner present their negative proportionality conclusion on p. 87.

However, with the abovementioned grounds the BAG referred the following question for a preliminary ruling:

Does Article 49 EC (formerly Article 59 of the EC Treaty) preclude a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived benefit of execution, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective?"

Hence, the question was whether the joint and several liability violated Article 49 EC. Mr. Pereira Félix, the Austrian, French and German governments plus the Commission saw no essential problems therein because the provision was intended to serve the protection of the posted workers. Wolff & Müller took a different point of view. It carefully enlisted EC law grounds against the liability.

2.2.2 The Argumentation of the Principal Contractor

The point in national law of Wolff & Müller was that Paragraph 1(a) of the AEntG constituted an unlawful infringement of the constitutional right to carry on an occupation under Article 12 of the Grundgesetz (Basic Law). The ECJ naturally did not discuss this claim since the liability was under the scrutiny of EC law, not of any national law. However, other than this point the argumentation of Wolff & Müller¹⁰⁴ covered the four classical elements of the justification test:

- (i) The liability restricted the free provision of services in the form of a measure affecting all the (i.e. both domestic and foreign) actors concerned;
 - (ii) it was not justified by overriding reasons of public interest;
 - (iii) it meant a double burden on the free movement of services; and
 - (iv) it was not proportional.
- (i) Under this restriction argument Wolff & Müller set forth that the liability threatened to cause extra costs over and above the contract price. This risk was smaller for domestic subcontractors whose solvency, too, was better. This caused the need to obtain securities, which was easier for domestic subcontractors, due to their 'family bank' relationships. Abroad this liability ('Inanspruchnahme nach dem AEntG') was unknown and the risk for banks was therefore not possible to assess. Anyway, Wolff & Müller made an argument based on financial issues.¹⁰⁵ Next to this, it referred to

¹⁰⁴ See paragraphs 24 to 41 of the report for the hearing.

¹⁰⁵ As to these 'unknown' liability schemes abroad, see footnote 136, *infra*. Regarding securities Wolff & Müller also referred to judgment in case C-20/92 Hubbard [1993] ECR I-3777, paragraph 15, according to which a compulsion to provide securities for public

the laborious, if not excessively difficult, training and control measures that would be required for foreign subcontractors whose activities were in this way further burdened.

- (ii) With respect to the ‘overriding reasons’ justification, Wolff & Müller asserted that economic reasons were decisive behind the liability and could never fulfil this justification criterion. Protection of workers was only a side purpose (*Nebenzweck*), and, besides, the liability diminished job opportunities of posted workers. Its effect would become fully realised when there were no foreign subcontractors. If convincing, the argument would quash the liability. Hence, Wolff & Müller ‘expressed a pecuniary view’ and this way focussed on money.
- (iii) The ‘equivalence’ criterion (prohibition of a double burden) was handled by Wolff & Müller in the middle of the fourth criterion, the proportionality test. However, it boldly claimed that the liability violated proportionality because it led to a double burden. Namely (and this is spectacular in my view), it explained that the principal contractor, by paying the contract price to the subcontractor, had already fulfilled its obligations arising from its contractual relationship and had in this way concluded its monetary obligations to the workers of the subcontractor as well. So it goes, between the ‘market actors’, or ‘Marktbürger’. Anyway, Wolff & Müller focussed once again on money.
- (iv) Regarding the proportionality test, Wolff & Müller found that liability was not suitable, necessary or acceptable. It was not suitable because the principal contractor had no legal or factual capacity to check all the pay calculations. Broader on-site controls would be better, or, as an alternative novelty, a regulation under which the principal contractor would be obliged to pay a share – at every pay day - of the contract price e.g. to the Holiday Pay Fund (*SOKA-BAU*) against whom the workers could address their claims. At this point Wolff & Müller do not bother with the perhaps excessive economic difficulties that would be caused to foreign SMEs by such a scheme. A further violation of proportionality was in the chain of liability. It was impossible to control the behaviour of any ‘third’ parties, meaning sub-subcontractors. Enshrining the liability in law did not change anything in the proportionality test. Besides, the principal contractor did not just have high regression costs abroad but also all the risks of the high number of insolvencies in this sector. Hence, Wolff & Müller spoke about the risk of losing money.

authorities formed a restriction on services. In reality, in this case the Court found that Articles 59 and 60 must be interpreted as precluding a Member State from requiring security for costs to be given by a member of a profession established in another Member State who brings an action before one of its courts, on the sole ground that he is a national of another Member State. This would apply, by analogy, if Mr. Pereira Félix, or his barrister, were obliged to give securities in the main proceedings because he’s a foreigner! - As a non-restriction alternative for the liability the company Wolff & Müller presented a partial withholding of the contract price which anyway would be financially difficult, if not impossible for many foreign SMEs.

As a general comment, one has to note that the principal contractors seem to be rather helpless, if we take their argumentation seriously. The only thing missing from the argumentation is the assertion that the subcontractor and his workers may act as a complot against the principal contractor and ‘cash’ the wages for a second time. Such a risk exists, of course, but, by analogy, it would be impossible to stop all the car traffic because of the risk of a certain level of drunken drivers.

The overall problem with this line of argumentation is that it describes a position of a principal contractor that is not in accordance with the reality of the construction industry. Namely, the principal contractors are not at the mercy of the subcontractors, but the power relationship is the other way round. The supply of manpower exceeds the demand. Besides, as the Austrian government noted, the principal contractors have to check the background, with perhaps extra costs and other burdens, of any unknown subcontractor, irrespective of the wage liability.¹⁰⁶ Hence, for good reasons the ‘self-cleaning’ (Selbstreinigung) of the sector was referred to during the legislative process.

How did the court react to this argumentation? Not well. It handled the issues in points (ii), (iii) and (iv) in a completely different way. Regarding point (i) it let the national court decide whether this liability forms a restriction on free movement but anyway guided the justification. However, it is appropriate to present the contents of the judgment on their own merits, not just as a counter-position to the argumentation of the principal contractor.

2.2.3 Rieble’s and Lessner’s Liability Argumentation

Most of the argumentation of Wolff & Müller is also present in that of *Rieble* and *Lessner*. The difference is that Rieble/Lessner and partially Dörfler go even further in a market-orientated direction and, essentially, also discuss the Directive. Before discussing any further judgment *Wolff & Müller v. Pereira*, I will recap the essential points in their thinking and look at these in some more detail.

I recall their wage-competition orientated paradigm: the PWD infringes the free movement of services (and workers), at least the proportionality requirement, by leading to the setting up of minimum wages, and the AEntG implementing it logically does the same. Furthermore, and logically for them, the liability established by the AEntG is not compatible with the Treaty (Articles 39 and 49 EC). At the same time, for Rieble/Lessner it forms an independent restriction on the free movement of services.¹⁰⁷ In the argumentation of *Rieble* and *Lessner* there is present, as ‘helpful’ up to expressis verbis, the drawing of parallels from the free movement of goods to the posting of workers in the framework of providing services.¹⁰⁸ Doing so is perhaps natural in the light of history. The EEC was founded as a predominantly economic community with less emphasis on the social factor.¹⁰⁹ However, the use in

¹⁰⁶ See paragraph 69 of the report for hearing.

¹⁰⁷ See the basic hypothesis of Rieble and Lessner on p. 44: liability may be shown to be incompatible with the market freedoms either as an accessory to minimum wage regulations or independently.

¹⁰⁸ See details in footnote 110, point (ii), *infra*.

¹⁰⁹ See e.g. Jari Hellsten, On Social and Economic Factors in the Developing European Labour Law. Reasoning on Collective Redundancies, Transfer of Undertakings And Converse

2002 of parallels, in fact rather straightforward ones, from the free movement of goods means boldly neglecting the convincing body of case-law since *Seco* in 1982, as well as the legislative postulate behind the Directive, that of combining the guarantee of fair competition and the right of workers. It is enshrined in the fifth recital of the Preamble to the PWD.

I will take the liberty of not discussing this argumentation of Rieble/Lessner¹¹⁰ in any greater length in my corpus text here, apart from one essential exception. Namely, in exploring, along their liability-targeted path of arguments, the proportionality test in the justification pattern (see point (iv) *supra*). Rieble and Lessner maintain that there is no general, national or European, principle of equal pay for equal work. - I imagine that they admit/allow gender equality and Article 13 EC. - They assert therefore, that it follows that it is not possible to justify the restrictions on the free movement of services as combating distortions of competition by invoking such equal pay arguments.¹¹¹ This is in paradigmatic contradiction with the pivotal argument of Rieble and Lessner, according to which the PWD and AEntG also infringe the free

Pyramids (Hellsten 2005). Swedish National Institute of Working Life, Work Life in Transition 2005:11.

¹¹⁰ However, the argumentation of Wolff & Müller is present in the article of Rieble and Lessner at least, as follows. **(i)** Obtaining securities with greater difficulties for foreign contractors is a forbidden restriction (p. 57) and also violates the double burden prohibition (p. 80) for Rieble and Lessner. **(ii)** The purpose of AEntG Rieble and Lessner discuss especially on pp. 64-77. In assessing the 'economic' restriction Rieble and Lessner claim that the starting point must be the so-called 'Campus Oil' case-law. In *Campus Oil*, case 72/83 [1984] 2727, the Court accepted a restriction in oil trade based on a certain independent national supply. In judgments in case 172/82 *Inter-Huiles*, [1983] 555; C-203/96 *Düsseldorf* [1998] I-4075 and C-209/98 *FFAD* [2000] I-3743, the Court, according to Rieble and Lessner, found that restrictions on trade were acceptable if the measure concerned directly served environmental protection. Measures guaranteeing a critical mass for municipal waste treatment undertakings were of economic nature and, thus, not acceptable. Rieble and Lessner highlight that even if the public interest (protection of environment) was enshrined in the Treaty (Article 174(2) EC, ex Article 130(r)(2) EC), it could not (or, was not enough to) justify the restriction concerned. From these judgments concerning free movement of goods Rieble and Lessner draw a parallel with the case of minimum wages. The announced purposes of the AEntG were of an economic nature and, therefore, not of public interest. For the Court, labour is not a commodity which Rieble and Lessner blame, up to the assertion that the Court has – at least in *Portugaia* – by fiction(!) lent the essence of protection of workers to national minimum wage provisions. See Rieble and Lessner, p. 74. They also refer to the comment of Koenigs (DB 2002, 431) that the question was not answered in *Portugaia* and half expected (empfielt) a new case. Well, the same issue was again in *Wolff & Müller v. Pereira*. – **(iii)** The equivalence criterion (prohibition of double burden) Rieble and Lessner discuss (pp. 78-82) again with a helpful (hilfreich) reference to the origin of the prohibition in the free movement of goods (p. 80). However, their conclusion is that the posted workers are well enough protected in their country of origin (p. 82). **(iv)** Regarding the proportionality test Rieble and Lessner argue by claiming from the outset that the liability is as such a disproportionate measure (p. 87). Otherwise they argue here with grounds somewhat differing from those of Wolff & Müller while the conclusion is the same.

¹¹¹ Rieble and Lessner, p. 85: 'Es gibt [...] keinen allgemeinen Grundsatz gleichen Lohns für gleiche Arbeit – weder innerstaatlich noch auf europarechtlicher Ebene. Somit lässt sich mit der Herstellung solcher Bedingungen auch unter dem Aspekt der Bekämpfung von Wettbewerbsverzerrungen kaum der Eingriff in die Dienstleistungsfreiheit rechtfertigen.' They further refer to *MünchArb/Löwisch/Rieble* § 268 Rn. 122.

movement of workers under Article 39 EC.¹¹² Namely, it is exactly equal remuneration that is enshrined in Article 39(2) EC, prolonged by the Regulation 1612/68 EEC. Anyway, for *Rieble* and *Lessner* it is defensible and even natural to pay less for posted workers than for those who remove on their own initiative. Logically, for them, it is not proportionate to require equal treatment in remuneration and the liability as a measure of enforcement. Indeed, proportionality seems to have ‘quite many’ dimensions. However, the equal pay aspect pushes the issue ultimately close to, if not inside of, constitutional values. The concept of Article 39 EC in the thinking of *Rieble* and *Lessner* is simply not correct.¹¹³

It is noteworthy that *Rieble* and *Lessner* also have under the proportionality test arguments that remain in the framework of services. Namely, they claim that the ‘purpose and goal’ (Zweck und Ziel) of the liability are disproportionate;¹¹⁴ that there should be just the normal responsibility of the principal contractor, requiring first execution against the employer; and that professional clients other than building companies should not be burdened. The first mentioned gets answered in exploring judgment *Wolff & Müller v. Pereira*, *infra*; the second (requiring just the normal guarantor status) remains as a possible claim, and the last mentioned requires the comment that it would drop even significant works from the ambit of the liability if undertakings outside the rank of construction companies were not covered. Private persons are not covered.

However, while *Rieble* and *Lessner*, too, discuss the Directive in this context, it is appropriate to note its key provision, i.e. Article 5. It reads, as follows:

‘Measures

Member States shall take appropriate measures in the event of failure to comply with this Directive.

They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.’

¹¹² See section ‘Freizügigkeit der “mitgebrachten” Arbeitnehmer’, *Rieble* and *Lessner* p. 44-47. There the argumentation goes so that we should also acknowledge in Article 39 EC a ‘freedom-related’ legal (‘freiheitsrechtlich’) prohibition of restrictions which the worker could invoke against depriving him from his benefit in wage costs (Lohnkostenvorteil) and his chances of entering the labour market; p. 46.

¹¹³ See also the text in section 2.3.5 *supra*.

¹¹⁴ Martin Franzen in SAE 2003, 181, 190-197, as explained by Bernd Sandmann, Die Entwicklung des arbeitsrechtlichen Schrifttums im Jahr 2003, ZfA 4/2004, p. 544, refers, as to proportionality, to judgment *Mazzoleni*, C-165/98 [2001] ECR I-2189, and finds that the posted worker does not need at all the liability of the principal contractor. The (other) regulations protecting him (like the PWD) would be enough. Accordingly the restriction on free movement of services would not be balanced but disproportionate. He has explained exactly the reference of BAG in the proceedings *Wolff & Müller v Pereira*. Anyway, the ECJ handled proportionality in a completely different way, see section 2.2.5, *infra*. – *Mazzoleni* was a *sui generis* decision on permanent ‘frontier posting’ that does not amount to an effect on ‘normal’ posting cases.

Noteworthy as a structural factor is the submission of *Rieble* and *Lessner* that the mandate (Ermächtigung) in the implementation of the Posted Workers Directive does not cover a wage liability of the principal contractor that is independent of its contractual obligations (verschuldensunabhängig). They also refer to the ‘fact’ that Article 5 PWD (Measures) deals only with a ‘threat of omissions in the implementation’. On the same line, as not leading to any liability, they read ‘obligations under this Directive’ in Article 5(2). They further denote how the Directive does not include any third party’s liability. In this way, too, they contest the liability of the principal contractor covering all the subcontractors in the chain. And they denote Article 5(1), qualified by them with a ‘certainly’ (‘zwar’), whose violation may only lead to an infringement procedure against a Member State (impliedly, not to any liability).¹¹⁵ These submissions essentially stem from the wording of Article 5 but only if read in isolation. Anyway, the application of Article 5, as read and applied in its context, is the core of the case. I will return to this in exploring the judgment.

However, *Rieble* and *Lessner* conclude their argumentation against the liability in the light of the Directive by referring to the so far culmination of the very *acquis*, i.e. the lack of horizontal direct effect of the directives. For them, this would prevent such a liability. Indeed, what could be more convincing than a kind of a European ‘Grundnorm’ à la Kelsen... *Rieble* and *Lessner* further denote that the horizontal direct effect is impossible in a relationship between ‘market citizens/actors’ (Marktbürger).¹¹⁶ Indeed, for *Rieble* and *Lessner* both Herr Maurer Pereira Félix (with his hopefully healthy hands) and Wolff & Müller (with a yearly project value of 670 M€¹¹⁷) are just ‘Marktbürger’. In reality there is no such legal connection between the lack of horizontal effect and liability. It was difficult enough to gather the qualified majority behind the PWD even without inserting liability in its text. That is why it is together with other means of enforcement not *expressis verbis* mentioned by the Directive but was left to the Member States. As such, the examples in Austrian, Belgian and French laws were available in winter 1995/6.¹¹⁸

Mr. Pereira Félix did not base his lawsuit on any alleged direct effect of the Posted Workers Directive. Neither did the question subject to preliminary ruling include a reference to it. Therefore the Court did not have to decide thereupon. But it had sufficient in applying the Directive in the traditional context.

2.2.4 Dörfler’s Liability Argumentation

I first recall how Dörfler, despite his deep criticism of the justification of the AEntG, predicted that the ECJ would one day accept the AEntG as being compatible with the

¹¹⁵ Rieble and Lessner, ZfA 1/2002, p. 51

¹¹⁶ ‘Hingegen sieht die Richtlinie keine unmittelbaren Ansprüche des Arbeitnehmers gegen den Generalunternehmer vor, da die unmittelbare Wirkung von Richtlinien nur im vertikalen und nicht im horizontalen Verhältnis (Marktbürger untereinander) möglich ist.’ Ibid.

¹¹⁷ See <http://www.wolff-mueller.de>. The group has some 2.700 employees.

¹¹⁸ On the other hand, Article 6 PWD was a necessary provision in the Directive so as to impose the establishment of a complementary forum for judicial proceedings in the host state, given the Brussels Convention on jurisdiction and execution of judgments (replaced now by EC Regulation 44/2001).

Treaty. He, too, found that the liability forms an independent restriction on the free provision of services while it represents only indirect discrimination.¹¹⁹ However, his discourse on the justification of the liability by using the concept of overriding requirements of general interest is in fact rather short. In essence, he states how the liability is ‘an extension of the legal position’ (eine Erweiterung der Rechstellung’) of the worker¹²⁰ but moves immediately on to discuss its possible justification as an instrument under the social security regulation 1408/71 (a discussion in vain) and the general interest in liability in insolvency situations. Regarding the latter he finds that the Insolvency Directive gives a comparable protection under home state law, unless outside its three months’ time limit.¹²¹

The main arguments of Dörfler come under the proportionality test. He finds that liability is appropriate for securing the attainment of the objective which it pursues, while it, however, at the same time diminishes the amount of foreign posted workers.¹²² Reasoning on the necessity argument (‘not to go beyond what is necessary’) then brings about the essential result. Firstly, Dörfler misleadingly refers, in particular by analogy to the free movement of goods, to the prohibition of double control established in *van Wesemael*¹²³ (and somewhat reformulated in *Webb*) and then wants to reinforce his argument by citing paragraph 51 of *Arblade* where the Court discussed the question of paying employers’ contributions to a social fund both in the home and host state. As in fact Dörfler himself explains, the basic situation is that there is no relevant liability under home state law unless based on a more than unlikely agreement between the principal contractor and his foreign subcontractor. Hence, it is not a situation of double burden in the sense of EC law. In his final conclusions of the whole dissertation he still finds that the posted foreign workers do not need any principal contractor liability.¹²⁴ Secondly, Dörfler discusses, nearing or partially joining the line of *Wolff & Müller*, less restrictive measures, such as paying wages of foreign workers to the authorities(!) (which he himself refutes i.a. as discriminatory), bank guarantee (refuted as not appropriate), enhanced state control (which would justify even repealing the liability), exclusion of liability in insolvency situations (as in Austria) and finally the use of liability but only limited to culpability, thus requiring *culpa in eligendo/contrahendo* or corresponding reprehensible conduct by the principal contractor.¹²⁵

Dörfler’s conclusion under the necessity assessment is that less restrictive alternatives for liability do exist which further leads him to conclude that the existing liability form is disproportionate, and especially with respect to foreign subcontractors is not compatible with the free provision of services.¹²⁶

¹¹⁹ Discussion on open (direct) discrimination, Dörfler, pp. 132-146, with the conclusion on p. 147 that the liability is a restriction of other type (‘eine sonstige Beschränkung’). Discussion of the justification of the liability is on pp. 201-217.

¹²⁰ Ibid., p. 202.

¹²¹ Ibid., p. 207.

¹²² Ibid., 209.

¹²³ Ibid., 209-210; joined cases 110 and 111/78 *Van Wesemael* [1979] ECR 35.

¹²⁴ Ibid., p. 238.

¹²⁵ Ibid., pp. 212-216.

¹²⁶ Ibid., p. 217.

2.2.5 Substantive Part of Judgment Wolff & Müller

In the previous cases *Arblade*, *Finalarte* and *Portugaia* the Court did not apply the Posted Workers Directive because the events concerned had occurred before 16 December 1999, that being the deadline for its implementation. In *Wolff & Müller* the works were carried out in spring 2000 and the Directive therefore applied.¹²⁷ Hence, in the judgment the Court noted this as well as the presence of a situation provided for in Article 1(3)(a) of the Directive. It then proceeded to an assessment and application of Article 5 PWD.

As became obvious from the submissions of *Rieble* and *Lessner*, they read Article 5 word by word but in isolation. The Court first put Article 5 into its proper context (in paragraph 28) by taking Article 5 as intending to implement the basic substantive provision in the Directive, i.e. Article 3(1)(c) that includes the obligation to pay the minimum wage. Or, in terms of the Directive, that is what the undertakings have to *guarantee* (as it stays in every language) to their workers.

The Court further noted (paragraph 29) from Article 5 how the Member States have to ensure, in particular, that the *workers posted* have available to them adequate procedures in order *actually* to obtain minimum rates of pay. This style of writing might be regarded as too simple for the European legal audience, but given the way e.g. (or in particular) *Rieble* and *Lessner* have interpreted Article 5, it clearly has its place. Anyway, it seems essential to see that here the Court first distilled the obligation of the Member States to guarantee that something *actually* happens, i.e. that the Directive has real teeth.

The Court then for its part relied (in paragraph 30) on the wording of Article 5 PWD but concluded, as a continuation to paragraph 29, that it was apparent that the Member States have a wide margin of appreciation in determining the form and detailed rules governing the adequate procedures under the second paragraph of Article 5. As is the case with all directives, Article 249 EC sets up the framework. It here means that Article 3(1) PWD forms the goal (i.e. that the undertakings guarantee...) whereas Article 5 deals with the form and methods, to use the language of Article 249, so as to achieve it. Hence, the outcome first is that it is up to the Member States whether they establish any liability of principal contractors or other clients. Contrary to what *Rieble* and *Lessner* maintain, the Directive clearly includes a mandate for the Member States to set up the wage liability, while they have no obligation to do so.

Furthermore, it was self-evident (and based on settled case-law, of course) to add (in paragraph 30) that in ‘applying that wide margin of appreciation [the Member States] must however at all times observe the fundamental freedoms guaranteed by the Treaty...and, thus, in regard to the main proceedings, freedom to provide services.’ Observing the freedom to provide services essentially means to subordinate the national law implementing the PWD to the four step justification test (that *Rieble* and *Lessner* call the ‘van Waesemael/Webb formula’). That is what the Court applied as

¹²⁷ Paragraph 24 shows how the Court may also take into consideration rules of Community law which the national court has not referred to. The Court referred to the Directive as a forthcoming binding instrument of EC law already in judgment *Arblade* (paragraph 79) in 1999.

settled case-law, also in *Arblade*, *Finalarte* and *Portugaia*. The decision on whether there is, by the liability, a restriction on services the ECJ left for the national court,¹²⁸ highlighting the necessity also to take into account the position of a principal (general) contractor established in another Member State (paragraph 33). They are few, but they have the same liability as domestic principal contractors.

For the case that the national court would find the liability as a restriction on services, the Court repeated the standard formula of the public interest justification of restrictions (paragraph 34), coming to the protection of workers (paragraph 35) as an overriding reason for that interest, this being the cornerstone of labour law within the free provision of services, as confirmed in paragraph 36 of *Arblade* (referred to here via judgment *Portugaia*). In other words, extension of minimum wages (a must under the PWD) pursues an objective of public interest, as also stated in paragraph 36 of *Wolff & Müller v. Pereira*. Then comes the simple move that ‘the same is true in principle’ with respect to ‘measures intended to reinforce the procedural arrangements enabling a posted worker usefully to assert his right to a minimum rate of pay.’ This was no surprise, since already judgment *Seco* in 1982 referred to appropriate measures in guaranteeing observance of the rules concerned (as did *Rush Portuguesa*, *Vander Elst* and *Arblade*). However, the requirement for ‘procedural arrangements to ensure observance’ of worker protection as corollary (‘likewise’) to this protection was again noted in paragraph 37. The approach is clearly different from that of *Rieble* and *Lessner*. Namely, while they primarily maintain that the obligation to extend minimum wage provisions is not compatible with the Treaty, also rendering the liability incompatible, they essentially, as a secondary issue, find that the liability would also be an *independent* restriction on services (and, moreover, even a case of direct discrimination).¹²⁹ Finally it is worth noting that the Court did not even mention the discrimination aspect.

The question subject to preliminary ruling and the observations of the BAG included again the priority purpose of the AEntG, namely that of protection of the national job market rather than the remuneration of workers. As in *Portugaia*, decisive is whether there is a genuine benefit to the workers, which significantly augments their social protection, while the stated intention of the legislator may only lead to a more careful assessment of the benefits (paragraph 38). The BAG also referred to practical difficulties since the foreign workers are not fluent in German and do not know German law, and to the diminishing job opportunities as a consequence of the liability (paragraph 39). This the Court first balanced by stating how the liability ‘none the less’ adds a second and normally more solvent debtor which on an objective view is such as to ensure the protection of posted workers, also supported by the main proceedings themselves, with the worker as a plaintiff (paragraph 40). Thus, the Court stated how the host state law *added* another and normally more solvent debtor. This implied that there was no equivalent rule in the home state. This is all we find of the equivalence test in this judgment.

¹²⁸ The Court noted in paragraph 32 how the application of host state rules is *liable* to prohibit, impede or render less attractive the provision of services by subcontractors from other Member States,

¹²⁹ See e.g. the conclusion on p. 89.

As a new aspect in relation to *Portugaia* and as a direct consequence of the application of the Directive the Court stated (in paragraph 41) that unfair competition, by paying the workers less than the minimum rate of pay, ‘may be taken into consideration as an overriding requirement capable of justifying a restriction on the freedom to provide services’ if the other provisions of the justification pattern are met. The other provisions mean in practice the equivalence and proportionality tests. It is however difficult, if not impossible,¹³⁰ to imagine an equivalent norm in the home state law rendering the liability superfluous. Anyway, the Court continued by stating (in paragraph 42) that there is not necessarily any contradiction between fair competition and ensuring worker protection, as demonstrated by the fifth recital of the PWD.

The Court left the proportionality test under EC law, as often happens, for the national court but gave further guidance to it, given the submissions of Wolff & Müller and the grounds for the question referred to for preliminary ruling, that the principal yardstick must be ensuring the protection of workers, not the position or possibilities of the principal contractor as a guarantor, or the legislative grounds of the AEntG, (paragraphs 43-44). I recall how Wolff & Müller invoked under proportionality different difficulties such as those in control, guidance, chain responsibility and regression. All these grounds were de facto dismissed by the ECJ. The only ground of Wolff & Müller still *prima facie* ‘open’ was the proposal of paying, as an alternative for the whole liability, a share of wages e.g. to the Holiday Pay Fund (SOKA-BAU) against whom the workers could then claim the minimum wages. Such a proposal is purely hypothetical. Besides, it was at the same time based on difficulties in control. Thus, by placing the protection of the worker concerned as the yardstick, this alternative, too, was de facto dismissed as a ground. Besides, the BAG had already found that the liability passed an even broader proportionality test under German law (see paragraph 13 of *Wolff & Müller v Pereira*).

In substantive terms the proportionality test in EC law requires that the measure must be apt to ensure attainment of the objective pursued (appropriateness) and must not go beyond (necessity) what is necessary in that connection (paragraph 43). Hence, it differs from the proportionality test under German law according to which there is

¹³⁰ I see, of course, the theoretical situation that there is liability in the home state law but none in the host state law, and that the posted worker would try to get the home state liability applied by either the host or home state court. Article 6 PWD entitles one to institute proceedings in the host state but still, under private international law, it is far from clear that the host state court would apply the home state law. On the other hand, it is not guaranteed that a home state court would render a default judgment, if the principal contractor did not show up as a defendant, or that the host state authorities would execute a default judgment by a home state court. See that the Commission has published a proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II") COM/2003/427 final. According to that proposal (Article 9(5)) where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. As such, it would also apply to the liability rules of another Member State. I still doubt whether any court would apply the liability rules of another state against a principal contractor of a state where there is no such liability. However, the question is merely academic while any prudent worker (or his lawyer) chooses *forum domicilii* whenever such *lex fori* includes the liability – as in *Wolff & Müller v Pereira*.

also a third element, namely a more general reasonableness test (Angemessenheitsprüfung). This third and at the same time rather vague element by definition tends to limit the rank of measures regarded as justified restrictions on the free movement of services.¹³¹ However, as in case *Wolff & Müller v Pereira*, also in its judgment of 20 July 2004 the BAG found that the joint and several liability did not violate the German proportionality principle.¹³² The liability scheme justified itself simply based on the responsible position of the principal contractor in the subcontracting decision. The BAG also took account of regression and the possibility of requiring guarantees. The subcontractor was from a third country (Croatia) which excluded according to BAG any preliminary ruling by the ECJ (paragraph 27). The latter decision is not justified in every case due to Article 1(4) PWD, according to which ‘Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State’. However, there was no such claim in the case (see especially paragraph 8).

It has to be emphasized that the BAG, in *Wolff & Müller v. Pereira*, came to be guided by the ECJ to make the protection of workers the very yardstick of the proportionality test. Furthermore, it must be emphasized that the national court, in applying the principle of proportionality, applies a principle of Community law, not the German proportionality test.¹³³ In the case of posted workers it means that a

¹³¹ On this in brief, see e.g. von Danwitz, Die Rechtsprechung des EuGH zum Entsenderecht, EuZW 8/2002, p. 241. He highlights for good reasons the difference between the German and EC law proportionality test. Von Danwitz denotes that at least since early 1990s the ECJ has refrained from the use of reasonableness in the proportionality test. He refers to an already convincing set of plenum judgments: Germany v. Council [1994] ECR I-4973, paragraph 91 et seq.; Germany v. Council [1995] ECR I-3723, paragraph 42; UK v. Council (The Working Time Case) [1996] ECR I-5755, paragraph 57; Germany v. Council and Parliament (Directive on deposit-guarantee schemes) [1997] ECR I-2405, paragraph 54; and (from a Chamber) Kellinghusen [1998] ECR I-6337, paragraph 33. Besides, the twofold formula was also used, of course, in judgments Arblade (paragraph 35) and Portugaia (paragraph 19). The former referred i.a. to cases Case C-76/90 Säger, [1991] ECR I-4221, paragraph 15; Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 32; and Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37. The latter referred to Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 25, and Case C-165/98 Mazzoleni and ISA [2001] ECR I-2189, paragraph 25). This overwhelming and settled case-law operates with the twofold formula of the proportionality test: appropriateness/suitability – necessity/‘not beyond’. Thus, this formula is no novelty, indeed, in paragraph 43 of *Wolff & Müller v. Pereira*. I recall how Görres has suggested that the test would be threefold even in EC law, thus also covering the (German type) reasonableness of the measure concerned, see footnote 74, *supra*. However, he does not refer to any EC case-law, no wonder.

The (erroneous) application of a threefold proportionality test by Görres also has obvious consequences. In assessing the reasonableness of the extension of more than one (the lowest) wage category by the AEntG he seems to even somewhat regret (under ‘Extension of competition disadvantages’ – ‘Erstreckung von Wettbewerbsnachteilen’) that the foreign companies become deprived of their competition advantage in Germany. On the basis of the protectionist effect he draws the conclusion that such an extension is not reasonable (ist unangemessen) and is therefore not justified, *ibid*, pp. 288-291. The outcome does not correspond to the PWD. It allows the extension of the whole wage scale, see section 3.2 (in fine), *infra*.

¹³² Case 9 AZR 345/03 of 20 July 2004, paragraphs 26-7.

¹³³ As to the role of national courts and the guidance often given by the ECJ, see e.g. a nutshell explanation of Takis Tridimas, The General Principles of EC Law, Oxford University

national court must also take into account the Posted Workers Directive, with its obligation to ensure that the posted workers receive the minimum pay covered by the Directive. A further relevant aspect is the wide margin of appreciation granted to Member States in implementing the directive (paragraph 30 of *Wolff & Müller v Pereira*). For its part this limits the proportionality assessment.

The overall conclusion of the ECJ, on the basis of the Arblade-justification test as elaborated by the PWD, was that Article 5 PWD, interpreted in the light of Article 49 EC, does not preclude the German liability scheme. As to the substance, there was finally no surprise in this case, unless it was the BAG first pushing the German law under EC law scrutiny with grounds that were partially the same (the purpose of the AEntG) as in *Portugaia*. However, in its decision of 12 January 2005 the BAG put into practice the justification line established by the ECJ. The BAG referred to the requirements of fair competition and protection of workers, and also found that the risk of liability costs for principal contractors is more controllable than that of losing the wage for the posted workers. The conclusion was that the liability is not a disproportionate restriction on the free provision of services.¹³⁴

It is illuminating that the ECJ did not discuss ex officio the nature of the guarantee, i.e. applying and perhaps accepting only a benefit of execution scheme instead of a scheme operating with joint and several responsibility. This was one of the claims by Rieble and Lessner, while Dörfler foresaw a culpability scheme. However, both types of claim will normally not come in future, because the Court in this case already accepted a scheme with a joint and several responsibility. It was natural to leave without comments in the judgment the submission of Wolff & Müller as to the equivalence criterion; i.e. that by paying the contract price the principal contractor would already have discharged a sufficient monetary performance to the worker of the subcontractor.

It was equally natural to require the application of the PWD within the limits set up by the Treaty. That is the case for any European directive. Still missing is an interpretation of the PWD expressly in the light of Article 50(3) EC. It refers to the same conditions between domestic and foreign service-providers. However, that aspect is in fact included in the Court's reasoning (in paragraph 33) when it guided the national court in assessing the possible restriction on the freedom to provide services. It stated that principal contractors from another Member States are bound by the same liability as domestic ones.

In sum, in *Wolff & Müller v. Pereira* the Court applied the heaviest part of the Posted Workers Directive, i.e. the minimum rates of pay, as reinforced by a structural measure in national law, i.e. the liability of the principal contractor. It did this by highlighting the basic philosophy behind the Directive, that of combining fair competition and the rights of workers, and respecting the powers of the Member

Press 1999, p. 160-2. When the validity of a Community act is challenged, the ECJ also decides the proportionality aspect. In preliminary rulings the ECJ may decide the proportionality issue itself or leave it for the national court within specifically variable guidelines. In enforcement (infringement) proceedings against Member States the ECJ naturally always determines conclusively whether a national measure or practice infringes Community law in the light of proportionality. Op.cit, p. 160, footnote 196.

¹³⁴ See decision of 12 January 2005, 5 AZR 617/01, paragraphs 72-74.

States in implementing the Directive. The Court in a natural way extended the work of the European legislator.¹³⁵ On the other hand, that work (the PWD) has its roots in case-law since *Seco* where the Court decided the basic contents of the internal market with respect to wages in the free provision of services.

2.2.6 Effect of *Wolff & Müller* on Other Liability Schemes

There are relevant wage liability schemes in at least Austria, Belgium, Finland, France, Italy, the Netherlands and Spain.¹³⁶ They sometimes operate in close connection with social security and/or even tax liability. The main line of analogy is clear: while the Court in *Wolff & Müller* found a wage liability scheme with joint and several responsibility to be compatible with the free provision of services, i.e. the broadest possible interpretation, the corresponding or ‘milder’ wage liability schemes, as they normally are, are likewise to be regarded as restrictions that are compatible with EC law. The opposite would normally require a striking discriminatory element to be inherent in a given national scheme. On the other hand, social security and tax schemes both involve a *sui generis* question on the addressee of the contributions concerned. In the majority of posting cases it obviously is the home state. However, there are no reports on any cross-border application (or even attempts of such) of these schemes and so they fall outside of this reasoning.

Based on these national schemes the European Parliament in a resolution of 15 January 2004 concerning the implementation of Directive 96/71 called on the Commission to examine i.a. a European legislative framework or other forms of provision governing liability in the case of subcontracting.¹³⁷ While such a scheme by definition must treat purely domestic and cross-border cases on an equal footing, it is

¹³⁵ As a whole, the judgment also terminates any debate about the compatibility of the PWD or its legal basis with the Treaty.

¹³⁶ The Austrian scheme is in Article 7(c) of the *Arbeitsvertragsrechts-Anpassungsgesetz* – AVRAG. For wage liability in Belgium, see the *Loi sur le travail temporaire, le travail intérimaire et la mise de travailleurs à la disposition d'utilisateurs*, *Wet betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers* of 24 July 1987, Articles 31(3), 31(4) and 32(4). Liability regarding social security contributions in Belgium is enshrined in the *Loi révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs*, *Wet tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders* of 27 June 1969, Article 31bis; it also covers the payment of certain wage components via a social fund. As to France, see L-124.8 in the *Code du Travail* (Labour Code). In Italy a Legislative Decree issued by the Government on 3 September 2004 stipulated a liability scheme. In the Netherlands wage liability is based on Article 4 of the national collective agreement for construction sector (COA BOU). In Spain the *Ley del Estatuto de los Trabajadores* (Real Decreto Legislativo 1/1995 of 24 March), Article 42(2) establishes joint and several liability of the principal contractor regarding wages and (under certain conditions) social security obligations. The *Ley General Tributaria* 58/2003, of 17 December, Article 43(1)(f) imposes on the principal contractor a deficiency guarantor's liability regarding the social security contributions.

¹³⁷ Document P5_TA(2004)0030, Implementation of Directive 96/71/EC; European Parliament resolution on the implementation of Directive 96/71/EC in the Member States (COM(2003) 458 - 2003/2168(INI)), paragraph 6.

arguable that the EU could not enact such a legislative instrument within the free provision of services but only under approximation of laws.

Amongst the national schemes, the Finnish one obviously has its own unique features. It contains a secondary threat of confiscating unfair profits gained by paying wages that are lower than the required national minimum concerned. It merits a more detailed discussion.

2.2.7 Finnish Scheme

In Finland there are two possible remedies under the legislation. First, all the relevant sector-wide collective agreements are declared *erga omnes* and do cover posted workers. Enforcement mechanisms other than a (highly unlikely) lawsuit of the worker are to be found both in law and in collective agreements (supposing that the employer does not join a Finnish employer organisation for the posting period). Namely, since May 2004 the Penal Code defines the payment of too low wages as a criminal offence (discrimination and profiteering-like discrimination based on nationality; the latter with a maximum imprisonment for two years). This may also lead to confiscation of the illegal benefit gained by paying the illegally low wages. The confiscated profit/benefit belongs to the state. A crucial point is that the confiscation can also be directed against persons other than those committing the crime, hence also against the client or principal contractor on whose account the posted workers have worked. Confiscation cannot be applied to the extent that the posted workers concerned do present their wage claims. Until 2002 merely a *de facto* theoretical possibility for a wage claim prevented the confiscation. Experience so far is confined to one essential judgment of a district court. However, this is subject to appeal. The case involved 12 Chinese stoneworkers posted to Finland as hired-out manpower! The illegal and confiscated benefit of the user undertaking from the work carried out which was of seventeen months duration was estimated to be 174,000€, as diminished by possible further wage compensations.

The confiscating system fits directly into the anti-fraud principle demonstrated by the ECJ in *Centros*: a Member State is entitled to take measures designed to prevent companies or individuals from improperly or fraudulently – and to the detriment of public or private creditors - taking advantage of provisions of Community law, at least by forming a posting company in another Member State.¹³⁸

Second, a quasi-binding wage liability of the principal contractor in the construction sector is stipulated in the Outside Labour Agreement. The principal contractor is liable to guarantee – as a guarantor that has kept the benefit of execution - payment of wages, final payment for piecework included, and holiday pay, all earned on the site

¹³⁸ Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24. In the field of free provision of services, it referred to Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13, Case C-148/91 *Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, paragraph 12, and Case C-23/93 *TV 10 v Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21.

concerned. However, such claims are precluded if they are not declared to the principal contractor within seven days of the due date. This obligation anyway is deemed to effect only *inter partes*, i.e. it does not extend to a lawsuit against the principal contractor (position of the Labour Court of Finland since 1981; it is the single national instance); it ultimately places an obligation on the employers' organization to urge the principal contractor to pay these wages but it is only a moral obligation for the latter. In the model agreements for subcontracting (hiring-out included), the principal contractors take on this responsibility but with a corresponding right to set-off the cost from the remaining contract price; on this basis the regime works well in practice.¹³⁹ The wages paid under this regime cannot be covered by the state guarantee regime (directive 74/02/EC on Employer Insolvency).

The merits of these two schemes must also be assessed in brief in the light of case-law and the PWD.

Penal sanctions have been accepted by the ECJ already in *Arblade* (paragraph 43) with the prerequisite that

‘those provisions must be sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply’.

The pay provisions in the collective agreements are available on the Internet. To get them is not excessively difficult.¹⁴⁰ As to the languages, any serious employer can surmount the language barrier, whenever needed in cooperation with his contract partner in Finland. The two of them cannot enter into an agreement without a language that both parties understand. The confiscation part of this penal scheme is justified by analogy with the liability assessed and accepted in *Wolff & Müller v Pereira*.¹⁴¹ The agreement-based liability (Outside Labour Agreement) is difficult to imagine being challenged under EC law after *Wolff & Müller v Pereira* because the ECJ in that case accepted a stronger scheme, i.e. a law-based liability (operating *de jure* with joint and several responsibility).

¹³⁹ If the principal contractor is not a member of the employers' organisation, his collective agreement-based responsibility does not work as such but the Finnish trade unions may use different industrial actions so as to impose corresponding payments on him; they can naturally do the same against any non-organised subcontractor or temporary agency;

¹⁴⁰ The social partners additionally produce simplified brochures on the key provisions.

¹⁴¹ That is why I do not see that a detailed scrutiny of the confiscation scheme under the *Arblade*-test is necessary in this reasoning.

Chapter III

On Minimum Wages under the PWD

3.1 General Remarks

The PWD is also a landmark in the sense that it has pay or remuneration as its object. It regulates pay, namely minimum pay. In so doing it first invalidates assertions that pay falls completely outside EC competence due to Article 137(5) EC.¹⁴² As also the Convention drafting the Constitutional Treaty has noted, that provision does not define exhaustively the Community competence on pay.¹⁴³ Next to the PWD, there are several other EC law instruments that at least indirectly stipulate rules on pay. Posting of workers is one example of issues within the Internal Market that in the evolution of EC law has imposed changes on the legal thinking of labour law experts and the wider audience.

While the modifications of the German *Tarifautonomie* are a flagrant example of a change imposed by European developments, a similar, even if less dramatic, example may be picked up from the Swedish debate. At the national level there is broadly a consensus between the social partners and state that the public authority shall not interfere in proper wage setting (compulsory state mediation is another issue). Accordingly, there is (as in Denmark) no *erga omnes* system of collective agreements but the de facto same result is achieved based on the high degree of organisation among employers, as augmented by concluding (with or without industrial pressure) separate company level agreements (*hångavtal*) with non-organised employers. For Sweden the possibility of keeping this system within the EU legal framework was an important precondition in negotiations on its access. Both countries heavily supported the PWD, since Denmark negotiated in 1993-4 the so-called Christophersen-compromise in Article 3(8) that was intended to safeguard the Danish (and later Danish-Swedish) system of a factual *erga omnes* effect of collective agreements. However, the interference of the European legislator in wage setting was no problem for social partners or governments in Copenhagen or Stockholm. This was notwithstanding the fact that the Danish and Swedish versions of Article 137(5) EC still are –as they were already in Article 2(6) of the Maastricht Social Policy Agreement - different from the others by referring to ‘pay *relations*’ (*lønforhold, löneförhållanden*). Here ‘relations’ has a similar meaning as in the expression ‘industrial relations’.¹⁴⁴

At the European level the United Kingdom opposed the Directive by invoking the lack of EC competence in the field of pay which Article 2(6) of the Maastricht Social Policy Agreement manifested. In the enlarged Community we have seen the first initiative to dismantle the *erga omnes* structure created by the PWD, in the form of a

¹⁴² As to different conceptions on this provision, see Jari Hellsten, Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements. Labour Policy Studies No. 259, Ministry of Labour (Finland) 2004 (Hellsten 2004); available also by http://www.mol.fi/mol/fi/99_pdf/fi/06_tyoministerio/06_julkaisut/06_tutkimus/tpt259.pdf

¹⁴³ See paragraphs 26-28, p. 14 of the Report of WG XI. Document CONV 516/1/03, REV. 1.

¹⁴⁴ See further Section 4.3, footnote 202.

complaint in January 2005 by Latvia against the Swedish application of the PWD. It is linked to the *Laval* case that I will explore in chapter 4.

3.2 Pay Jungle in Construction Industry

The construction industry received special treatment in the PWD since the Member States have to cover by the national *erga omnes* collective agreements also workers posted temporarily into their territory. This obligation the Council and the European Parliament described in Article 3(1) PWD in the strongest possible terms, at least such was the intention, by referring to Member States who shall ‘ensure...that undertakings ... guarantee workers posted the ... terms and conditions of employment...’.¹⁴⁵

These conditions mean those laid down by law or collective agreements (*erga omnes*) in the construction sector, as defined by the Annex to the Directive. The Annex *de facto* repeats the definition in the safety and health directive 92/57/EC covering ‘temporary and mobile’ construction sites. Behind this special treatment was the particular nature of the sector: workers move but products are stationary. On the other hand, the picture of the providers includes in most Member States a handful of big companies (or group of companies), followed by a reasonable number of ‘mid-size’ companies that are often active more broadly than just locally. Next to these groups, a myriad of small companies are active within the sector, and some of them are specialised in the hiring-out of manpower. Besides, self-employment exists in every Member State although its amount and effect varies greatly, including even bogus self-employment (*Scheinselbständigkeit*). In undertaking projects, use of subcontracting is widespread. In general terms, one may describe the provider side as diversified. One dimension is its link to the grey and even black economy.

Essential variations also exist on the workers’ side regarding the stability of employment relationships. Within bigger companies stable employment relationships for a part of the workers are not unusual which on the other hand may be the case for certain key workers even in smaller companies. As a contrast, e.g. in the Danish construction industry most workers are still in fixed-term contracts covering normally the actual site under construction. They are used to it and want to keep it.

More diversification stems from natural circumstances like weather conditions, as well as from economic conjunctures, resulting in repeated unemployment periods. Some work is seasonal, such as asphalt laying in Northern Europe. Some work requires highly qualified workers with considerable education and training (nowadays also equipped with computer skills) while bulk work exists as well, making it possible for nearly all healthy men and women to carry out it. Cultural diversification (in immigration) means differing numbers of foreign *permanent* workers (like the Portuguese in Luxembourg).

¹⁴⁵ The PWD might spice up the debate on a horizontal direct effect of directives; I have to pass it here. The same concerns interpretation of national (implementation) law in conformity with the objectives of a directive; see e.g. joined Cases C-397/01 to C-403/01 Pfeiffer, judgment of 5.10.2004, nyr.

This diversification in natural and economic circumstances seems to be one explaining factor in the diversification of pay forms and practices. However, the pay provisions in the European construction industry are, as they a priori are in other industries as well, bound to historical developments since the Middle Ages. They reached their present form normally in the era following the Second World War. Social protection with social funds and social security, together with enhanced training, due to new technical developments, has emerged since WWII.

Today pay diversification means linking actual pay to a multitude of factors, such as training, experience, age, site, sub-sectors (some ten in Finland), profession (there are tens), practical on-site circumstances, new production or maintenance, length of service, area within the state (like East-Germany or the minimum wage areas in France), remote location, paid public holidays and applications of shortened working time. Most often pay is calculated by hour but performance-related pay still forms an essential feature. It (i.e. a fully performance related pay) is still the main pay form in new production in Sweden and Finland. The final time frame for pay calculations may be as long as 12 to 18 months, as for nuclear powers stations or landmark projects like the Great-Belt tunnel-bridge combination in Denmark, which was under construction for some eight to ten years in all. Partial performance-related pay exists as well, comprising a stable and a varying part. As an ultimate example of this pay diversification I would mention the performance pay scheme in the collective agreement of the Finnish plumbing trade, the clue being that in new production the works and workers on a site form one single entity, within which a joint pay is calculated. The scheme was adopted in the 1950s in order to prevent a distribution of tasks that may result in greatly varying earnings between the plumbers. At the same time it means subordination to the fully performance-related pay form; like in bricklaying: by laying 1000 bricks a day, or laying just 300; the fluctuation in earnings is linear when the worker is paid by the brick.

Due to the diversity of the terms and conditions applicable, the European social partners – FIEC and EFBWW – have never made any serious attempt to formulate for the construction sector any European minimum wage even in the form of a general definition. The Member States have taken the same line. Anyway, a *sui generis* proposal came from the German government at the end of the preparations of the PWD, which was intended to enshrine first the lowest wage category in a national collective agreement as generally binding (*erga omnes*). Later on, the proposal was in the form of a ‘certain’ category, as specified by the Member States. In practice this was intended to legitimise the lowest category as generally binding (*erga omnes*).¹⁴⁶ The counter-proposal was the text finally adopted in Article 3(1), second subparagraph, which leaves the definition for the Member States. The definition inevitably includes first (i) a decision whether the minimum wage comprises more integral parts. If there are several elements both in home and host states, then (ii) a further stocktaking on the way to compare these wage components is necessary.

¹⁴⁶ The first national posting-law in Germany (*Arbeitnehmer-Entsendegesetz*) of 26 February 1996 realised this concept. The amendment of 1998 (the *Korrekturgesetz*) repealed the requirement to use (only) the lowest category as the generally binding minimum wage.

Such a flat rate (as age-related) is applicable especially in the United Kingdom from 1999¹⁴⁷ while most of the other Member States include the holiday pay and other supplements as integral parts of the minimum wage concerned.¹⁴⁸ The philosophy behind the Directive is intended a priori to respect national concepts as such, up to the extent that, according to Declaration No. 5 attached to the Directive, the PWD ‘does not entail any obligation to make provision on such [minimum] wages’. E.g. in the Belgian case gross remuneration means taking into account various site-, career- etc. related elements that altogether form the basis for the calculation of the 13th month and the bad-weather payments concerned. The same principal approach, hence a minimum wage comprising several integral parts, also prevails, in addition to Belgium, at least in the Nordic countries, France, Netherlands, Austria, Luxembourg and Italy. In these countries normally the whole pay scale and supplements are a priori applicable to posted workers. I will present the German intermediary system in explaining the infringement case *Commission v. Germany*.

3.3 Infringement Case *Commission v Germany*

3.3.1 Background

Case *Commission v. Germany*¹⁴⁹ involved again the debate on the contents of the minimum wage concerned, but this time, as the first case thereof, under the PWD that became compulsory on 16 December 1999. The Commission based its infringement claim on the fact that Germany does not recognise, with the exception of ‘construction supplement’, ‘all allowances and supplements’ paid in the home state as an integral part of the minimum wage payable for workers posted into Germany. The ECJ rendered its judgment on 14 April 2005. It deals with the interpretation of the second subparagraph of Article 3(1) PWD that reads, as follows:

¹⁴⁷ The adult rate of the minimum wage (for workers aged 22 and over) is now (until October 2005) £4.85 (7€) per hour, according to the National Minimum Wage Regulations 1999, SI 1999/584, as amended. As to the mostly positive experiences about these regulations, see e.g. Bob Simpson, *The National Minimum Wage Five Years On: Reflections on Some General Issues*, *Industrial Law Journal* Vol. 33 No.1, March 2004, pp. 22-46.

¹⁴⁸ The Belgian specialty is that the domestic employers paid contributions for the law-based holiday pay within the national law-based social security system. Belgium has imposed these contributions on foreign companies only if their workers posted exceptionally are subject to Belgian (i.e. host state) social security rules.

¹⁴⁹ See Case C-341/02, nyr. The ECJ presented the action, as follows (paragraph 1 of the judgment): ‘By its application, the Commission of the European Communities requests the Court to declare that, by not recognising as constituent elements of the minimum wage all of the allowances and supplements paid by employers in other Member States to their employees in the construction industry who are posted to Germany – with the exception of the bonus [construction supplement] granted to workers in that industry – and consequently by leaving out of account the wage elements actually paid by such employers to their employees thus posted, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC and Article 3 of Directive 96/71/EC [...]’.

For the purposes of this Directive, the concept of minimum rates of pay [...] is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

The judgment i.a. shows that the case developed in the course of the proceedings in the ECJ. However, to make it more understandable for a European audience it is appropriate first to explain in brief the German minimum wage system in construction.

A natural feature of the German system is that the minimum wage consists of two separate elements, namely the hourly wage rates and holiday pay. The social partners fix the hourly rates that the State has declared generally binding (*erga omnes*). The holiday remuneration is paid via the holiday pay fund (now called SOKA-BAU). That scheme was subject to a preliminary ruling in case *Finalarte*.¹⁵⁰

The German system means comparing the hourly minimum wage against that payable to the worker under the home state rules, and comparing respectively the holiday pay in Germany against that under home state rules. The home state rules may of course mean finally the terms and conditions in a work contract while the holiday pay rates are normally fixed collectively, either by law or collective agreement.

A further national feature is the simplification made in setting up the minimum hourly rates. There are separate minimum rates for the building sector (Baugewerbe), painting works (Maler- und Lackiererhandwerk), roof works (Dachdeckerhandwerk) and certain dismantling works (Abbruchgewerbe) but this division by sector or profession was not an issue in the infringement case.¹⁵¹ I will therefore explain the system only on the basis of the collective agreement for the building sector. However, in all these branches the minimum rates vary between East- and West-Germany (including Berlin). Next to this, workers are divided according to their professional qualifications into two wage categories since 1 September 2003.¹⁵² A third integral element of the minimum wage is the ‘construction supplement’ (Bauzuschlag), 5.9 per cent to its rate, as calculated for these four minimum rates (not of any total gross wages etc.), and subject to a brief discussion in case *Portugaia*.¹⁵³ The regulation setting up the minimum rates indicates the construction supplement separately, as well indicating the sum of the basic rate and supplement.¹⁵⁴ These sums are generally meant when speaking about the minimum wages concerned.

¹⁵⁰ See joint cases C-49-50/98, etc.

¹⁵¹ For electrical installations on building sites (Elektrohandwerk) there have been separate minimum wages since 1997 until 2001.

¹⁵² Dritte Verordnung über zwingende Arbeitsbedingungen im Baugewerbe, BGBl I p. 3372, 27 August 2002.

¹⁵³ Paragraphs 52 to 60 of the Opinion of Advocate General. The debate reveals that the construction supplement has historically been defined on the basis of three separate parts compensating the permanent change of sites and consequences of weather conditions. However, as the German government has noted (see paragraph 53), ‘With the evolution of the law of collective bargaining, the supplement has gradually lost its original function of compensating for specific forms of hardship and has today become, quite irrespective of its origins, a fixed component of the wage packet’.

¹⁵⁴ The rates per hour in force (slightly lowered(!) until 31.8.2007) in the building sector are, as follows: West-Germany (Berlin included), wage category 1 10.20€, wage category 2 12.30€; in East-Germany the respective figures are 8.80€ and 9.80€. See Fünfte Verordnung

The (four) rates construed in this way are de facto essentially lower than those resulting from a strict application of the pay scale and other pay terms and conditions in the national framework collective agreement between the organised social partners.¹⁵⁵ The holiday pay rate (a percentage, now 15.1% of the total gross wages) is the same for domestic and posted workers. The lower rates for posted workers are also applicable to German workers *ipso jure* outside the binding effect of collective agreements (either the worker or the employer is non-organised). This has the consequence that posted workers are not discriminated against in terms of EC law.

Anyway, it is essential to see that the German minimum wages (in construction) also mean an essential simplification because the whole pay scale and many supplements (including e.g. the winter pay scheme) are not applied to posted workers. This serves both the control and the free provision of services by improved legal certainty. As a price for this simplification and lower minimum rates Germany does not accept that performance- or quality-related bonuses can be part of the minimum rates.¹⁵⁶

3.3.2 Main Submissions

In its application the Commission held that the German legislation took account only of the general bonus granted to construction workers (construction supplement; Bauzuschlag in Germany) in comparisons between the minimum pay rates payable in Germany and the remuneration actually paid (paragraph 17 of the judgment). According to the Commission this prevented service providers in other Member States from offering their services in Germany. Furthermore, the Member States could not impose, as host states, their payment structure in comparisons (paragraph 18). More particularly, the Commissions accused Germany for not recognising the 13th and 14th salary months or contributions paid to social funds as constituent elements of the minimum wage (paragraph 19).

The German government opposed the application i.a. with the ground that it intended to amend its instructions (the explanatory notes; the ‘Merkblatt’) so that they would recognise, in principle, as constituent elements of the minimum wage allowances and supplements that do not ‘alter the relationship between the service provided by the worker and the payment which he receives’ (paragraph 20). The government further argued that special working hours which involve particularly high quality requirements or special constraints or dangers, have a greater economic value than

über zwingende Arbeitsbedingungen im Baugewerbe of 29 August 2005; Bundesanzeiger Nr. 164 vom 31. August 2005. The East-West division as well as the establishment of two categories according to skills etc. were not tackled in the infringement case.

¹⁵⁵ One may note regarding skilled workers an overall difference of 30% (or more). The collective agreement for employment relationships between organised management and labour for building works (BRTV-BHG) in West-Germany includes six general wage categories, the scale being (as from 1 April 2003) 10.36€ to 16.98€ per hour. In specialised works (here in fire protection) the scale tops 19.22€ per hour. The so-called Ecklohn (wage category IV without the construction supplement) was respectively 13.96€. In East-Germany the scale was 8.95€ to 15.14€, the top 17.14€ and the Ecklohn 12.45€. Wage category IV means minimum hourly wage for a worker who can carry out independently the tasks of a skilled worker.

¹⁵⁶ The explanation of the minimum wage is on the website www.zoll.de.

that of normal working hours and that the corresponding bonuses (supplements, primes) must be excluded in comparisons. If taken into account, ‘the worker would be deprived of the economic counter-value corresponding to those hours of work’ (paragraph 22). The government finally argued that the Commission incorrectly assumed that the German rules would require the foreign employer to pay the additional German bonuses in the case of work featuring special difficulties (paragraph 23).

3.3.3 Reasoning of the Court with Comments

The Court started its assessment (in paragraph 24) by recounting its established case-law on the right to extend the minimum remuneration rules to service providers from other Member States.¹⁵⁷ Judgments *Rush Portuguesa* (with its overall extension right concerning provisions in law and collective agreements) and *Vander Elst* (with a reference to extension of minimum wages) were not referred to this time while *Seco* of 1982 is referred to, together with *Guiot*, *Arblade*, *Mazzoleni* and *Portugaia*. Hence, the Court presented this ‘catalogue’ of case-law exactly as in *Portugaia* in 2002. It is anyway essential to see that in presenting the EC law in issue the Court, naturally as such, denoted (in paragraph 3 of the judgment) the 12th recital in the Preamble to the PWD that repeats the overall extension right of *Rush Portuguesa*. However, it seems that this ‘exegetical’ evolution highlights the need to set aside, in this post-PWD era, any further debate about the basis of the difference between *Rush Portuguesa* and *Vander Elst*. A special reason might be in invalidating at the same time the argument that the latter, and even the PWD, would mean the right to extend only the ‘minimum of minima’ rates of pay.¹⁵⁸ On the other hand, the chosen ‘catalogue’ in paragraph 24 clearly reflects the need to avoid any (at least future) debate about the limits of the extension obligation on the basis of the overall extension right of *Rush Portuguesa*.¹⁵⁹ Its literal application would mean extending

¹⁵⁷ Joined Cases 62/81 and 63/81 *Seco* and *Desquenne & Giral* [1982] ECR 223, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 12; Joined Cases C-369/96 and C-376/96 *Arblade* and Others [1999] ECR I-8453, paragraph 33; Case C-165/98 *Mazzoleni* and *ISA* [2001] ECR I-2189, paragraphs 28 and 29; and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21). There is again – as in *Portugaia*, paragraph 21 – the ‘beauty spot’ that the point of reference in *Arblade* should be paragraph 41 where it referred to *Rush Portuguesa*, paragraph 18.

¹⁵⁸ This is the leading, in fact misleading, explanation of e.g. Görres in his dissertation. See footnote 131, second paragraph, *supra*, and my explanation in section 3.2. (in fine), *supra*.

¹⁵⁹ Noteworthy as such, the Court omitted a reference to *Rush Portuguesa* already in judgment *Finalarte* in 2001. The question concerning the length of paid annual leave for posted workers the Court also answered in brief by referring to the minimum nature of the Working Time Directive (with a corresponding national margin of discretion) and to the statement that Articles 59 and 60 (now 49 and 50) EC did not in principle preclude the extension of the national holiday rights (paragraphs 55-59). However, Kolehmainen describes this negligence of *Rush Portuguesa* in *Finalarte* as ‘striking’ (Kolehmainen, p. 141). Without wanting to point out especially to Kolehmainen, I call this description an example of the ‘totem effect’ of *Rush Portuguesa*, common to the European posting audience. One exception is, of course, Paul Davies, who i.a. predicted in 1997 (judgment *Arblade* was rendered in 1999) that ‘the wholesale justification of national labour regulation, which *Rush [Portuguesa]* seems to accept, is vulnerable to attack and qualification at any time’; Davies, *Posted Workers: Single Market or Protection of National Labour Law Systems?* CMLRev. 34: 571-602, 1997, p. 596.

‘every point and comma’ of the pay provisions in the host state and this idea is certainly alien to a discussion about the German system. Instead of extending ‘every point and comma’ of the German pay provisions in construction, it is a simplified system. Further on, in *Rush Portuguesa* (as well as in *Vander Elst*) the extension right was noted as *obiter dictum* while in *Arblade*, *Mazzoleni* and *Portugaia* there was a deliberate question thereof, submitted by the national court for preliminary ruling. A final reason to exclude *Rush Portuguesa* from the ‘catalogue’ might well lie in the formal inconsistency of its literal application with the now confirmed, in fact rewritten inclusion of proportionality assessment in the use of the extension obligation. I will explain this below.

Connecting, necessary as such, the established case-law to the PWD (in paragraph 25 of *Commission v. Germany*) is, as to its wording, perhaps not the most successful while paragraph 25 declares that the case-law referred to ‘is enshrined in Article 3(1)(c) of Directive 96/71’.¹⁶⁰ Still, more important than these ‘exegetics’ is the fact that the ECJ presents the PWD, more particularly the extension obligation, also as an extension of the case-law since *Seco*. That is undeniable.

There is also an evolutionary step in rewriting the overall legal framework for assessing the extension rules in the present post-PWD era. At first glance it looks bigger than it finally is. However, it is in the second phrase of paragraph 24 that the Court qualified the extension rules, as follows:

The application of such rules must be appropriate for securing the attainment of the objective which they pursue, that is to say, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see to that effect, inter alia, *Arblade and Others*, [...] paragraph 35, *Mazzoleni and ISA*, [...] paragraph 26, and Case C-60/03 *Wolff & Müller* [...] paragraph 34).¹⁶¹

This passage means that the proportionality requirement of the *Arblade*-test also applies to the extension of minimum wages. In *Arblade* the passage referred to paved the way for the overall positioning of labour law (or protection of workers) in the legal framework of the free provision of services (concluded in paragraph 36 of

After *Portugaia*, the PWD and *Commission v Germany* the totem definitely belongs to history (or, to its place in the Preamble of the PWD, only). For clarity’s sake it is appropriate to note that Kolehmainen also refers (loc.cit.) to the application of the general justification test in posting case-law since judgment *Guiot* (paragraph 13). However, nowhere in her dissertation does she seem to refer to Davies’ quoted ‘prediction’.

¹⁶⁰ In reality only judgments *Seco* and *Guiot* of those referred to in paragraph 24 (see footnote 157, *supra*) are pre-PWD era, the other four (*Arblade*, *Mazzoleni*, *Portugaia* and *Wolff & Müller*) are post-PWD and could not affect the contents of the PWD. The Council and Parliament had decided them already in 1996. In French the case-law referred to in paragraph 24 was ‘consacrée’ in Article 3(1)(c) PWD.

¹⁶¹ This ‘inter alia’, as to labour law cases, meant e.g. *Finalarte* where the proportionality assessment applied to payment of holiday remuneration via a social fund and the extension of the scheme to cover the posted workers, too (paragraph 49). In *Portugaia* the proportionality assessment was not spelled out but it referred (paragraph 23) in more general terms to a possible infringement of Articles 59 and 60 (now 49 and 50) EC in the use of the extension right.

Arblade).¹⁶² *Mazzoleni* concerned a variably permanent and exceptional working in two Member States, and *Wolff & Müller* concerned an enforcement measure (liability of principal contractor; see Chapter II). How to explain this structure where every word (including judgments referred to) counts? My view is that labour lawyers should not ‘burn their sleeves’ with this use of proportionality.¹⁶³ It must be assessed on the basis of its wording, in its context and in the light of the practical results.

As to the wording, of equal importance to declaring the use of the proportionality assessment to be necessary, is the declaration of ‘the protection of posted workers’ as its yardstick. The full Court in *Arblade* established the application of the proportionality assessment to the protection of workers in general. In *Mazzoleni* a small chamber stated it *expressis verbis* in relation to the extension right, hence not regarding it as any radical move.¹⁶⁴ In *Wolff & Müller* the Court continued this proportionality path, at the same time by de facto dismissing the proportionality application suggested by the company Wolff & Müller.¹⁶⁵ Anyway, more important than the applicability *per se* of proportionality is the framing of its use by establishing the yardstick. At this particular point it is not ‘the promotion of free movement of services’, higher/lower economic burden for foreign service providers,¹⁶⁶ guaranteeing fair competition between undertakings or any other interest of the

¹⁶² See section 1.2.3, *supra*.

¹⁶³ Kolehmainen defends the interpretation that only the ‘expansion clauses’ in Article 3(10) PWD (possibility to cover matters outside the hard core list in Article 3(1) or collective agreements on sectors other than construction) would fall under the *Arblade*-test (she calls it ORPI-test – from overriding requirements of public interest), including proportionality. Hence, matters under Article 3(1) would not be subject to the *Arblade*-test, and, thus, not subject to any proportionality assessment. I understand this as a *prima vista* maximal impact of labour law thinking in this context. She bases this on the wording of the PWD – obviously meaning that only Article 3(10) refers at the use of the extension right to the qualification ‘in compliance with the Treaty’. Her second reason is that the opposite (i.e. finding the proportionality test applicable also to the list in Article 3(1)) would undermine the rationale of the Directive. She describes the outcome (in early 2002) as being that the interpretation of the ECJ remains to be seen. *Op.cit.*, p. 146-7 and 266. The wording of the PWD easily creates, indeed, the illusion that the list in Article 3(1) would completely fall outside the *Arblade*-test. However, the reference to the Treaty obligations in Article 3(10) was only intended to highlight them in applying Article 3(10), not to qualify Article 3(1) at all. The rationale argument is stronger, of course, and seems to endorse the PWD as a more straightforward labour law instrument etc. Anyway, with respect to a directive not even the rationale argument is, or cannot be, fully convincing – and did not convince the ECJ in *Commission v. Germany* - which becomes clearer in my explanations, *infra*. In general terms is Article 59 EC, in the light of which the PWD is to be interpreted, directly effective; see e.g. case 33/74 *Van Binsbergen* [1974] ECR 1299 at 1311-2. Escaping the application of such a provision of the Treaty with the principles in its settled case-law requires amending the Treaty or modifying it with a protocol adopted in the same procedure; adopting contradictory secondary legislation is not enough. A classical example is case C-262/88, *Barber* [1990] ECR I-1889, paragraphs 37 and 42-3 where the Court found that the two equal treatment directives concerned could not free one from obligations emanating from the Treaty (Article 141, ex 119). It only ruled out the retroactive effect of its judgment.

¹⁶⁴ The yardstick (protection of workers) was declared in paragraph 30 of *Mazzoleni*.

¹⁶⁵ See section 2.2.5., *supra*. The judgment declared the yardstick in paragraphs 42-43.

¹⁶⁶ See the Commission’s explanations in paragraph 18.

undertakings but the core of the labour law side of the PWD: the protection of workers. In this context the protection also covers individual work contracts.¹⁶⁷

As to the context, the normative ‘complex’¹⁶⁸ in issue simply means a practical application of the PWD in the light of the Treaty rules on the free provision of services. These Treaty rules are accompanied by the established case-law with its equally established proportionality assessment that naturally extends to the interpretation and application of the PWD’s concrete provisions. In this cross-border context pay is a category of EC law (*acquis*) whatever interpretations we may have, especially on Article 137(5) EC. To my mind it excludes only a self-initiated Community intervention on pay by virtue of *that* Article. However, pay is (also) a category of EC law even if the PWD (second subparagraph of Article 3(1)) leaves the primary definition of the minimum rates of pay for the Member States. Furthermore, had the PWD been established on another legal base (such as Article 94 EC), proportionality would enter into its interpretation and application simply by virtue of Article 5(3) EC. It is also worth mentioning that the ‘not beyond’ formula of the proportionality test was used in paragraph 24 to express the necessity element instead of the ‘same result to be achieved with less restrictive means’. The crucial point finally is, of course, the practical impact and results of the proportionality assessment. They come later in this case.

However, this (‘the PWD/extension right applies in the Treaty framework’) was the normative structure within which operates the Member States’ right to define the minimum rates of pay. In practical terms the dispute in the case concerned the question as to ‘which allowances and supplements a Member State must take into account as component elements of the minimum wage, when it checks whether that wage has been correctly paid’ (paragraph 27). In the course of the proceedings the German government amended its instructions (the explanatory note) by reversing the ‘rule-exception’ relationship. Thus, earlier the rule *excluded* from comparisons certain supplements and bonuses. It was reversed to *include* in comparisons certain supplements and bonuses. Following that amendment, account was to be taken of all additional payments made in so far as the ‘relationship between the service provided by the worker and the consideration which he receives in return is not altered in a manner detrimental to the worker’ (paragraph 30). This meant that e.g. quality-bonuses or those linked to special constraints in the work could not ‘eat’ or consume the minimum wage. Hence, it is to be highlighted that the amendment left in dispute what was to be taken into account, as becomes clear below.

¹⁶⁷ I can see that the proportionality assessment may have practical consequences e.g. cases concerning pay provisions in respect of the personal status of an employee (like sickness pay, paid anniversaries etc.). Such cases may be complicated, especially depending on their linkage to the law applicable without the PWD (e.g. due to variable length of service or just an artificially agreed law of a third country etc.). For space reasons I will set aside any detailed reasoning thereon.

¹⁶⁸ As opened with a few more words this normative complex means a Member State applying its minimum pay rules as part of Community law (PWD) and therefore subject to its general principles of law, like proportionality. Further parts of the complex are the Rome Convention and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

A further evolutionary step during the proceedings concerned the treatment of 13th and 14th salary months. Germany envisaged taking these into account as constituent elements of the minimum wage ‘on condition that they are paid regularly, proportionately, effectively and irrevocably during the period for which the worker is posted to Germany and that they are made available to the worker on the date on which they are supposed to fall due’ (paragraph 31). Given the in principle positive reply of the Commission, the Court confirmed this as being in conformity with the PWD (paragraph 32). The judgment does not reveal whether Germany based this (natural) concession on Declaration No. 9 of the Commission, Council and Parliament attached to the PWD. It enshrines the principle that in wage comparisons ‘account should be taken, when remuneration is not determined by the hour, of the relationship of the remuneration to the number of hours to be worked and of any other relevant factors’. The reference to ‘any other relevant factors’ may naturally mean the control aspect. One has to remember also the purpose of publishing the Declarations and to give them in so doing a stronger status than the Declarations usually have. This time the Declarations are in line with the Directive’s purpose and elaborate it.¹⁶⁹ However, the outcome at this point fully conforms to Declaration No. 9.

Germany urged that the same principle with respect to the 13th and 14th months be also applied to extra holiday bonuses paid abroad (only a *pro rata temporis* payment on the due dates during the posting period ‘eats’ the minimum wage; paragraph 34). The Court, however, found it unclear whether the complaint concerning contributions for the holiday bonus (and holiday pay) formed a separate head of complaint and dismissed the application for that part (paragraphs 34-37).

As mentioned, Germany amended during the proceedings its general instructions concerning different bonuses. Following that amendment, account was to be taken of all additional payments made in so far as the ‘relationship between the service provided by the worker and the consideration which he received in return is not altered in a manner detrimental to the worker’ (paragraph 30). Since the amendment concerned only the manner of construing the rule, the principal dispute remained. The Commission still wanted bonuses to be taken into account on a basis broader than the definition used by Germany. In issue here were, in particular, quality bonuses and bonuses for dirty, heavy or dangerous work (paragraph 38).

The decision of the Court was twofold but straightforward, as follows:

’39 Contrary to what the Commission submits, allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, *and* which alter the relationship between the service provided by the worker, on the one hand, and the consideration which

¹⁶⁹ On a similar line concerning such declarations, see case C-368/96 *Generic et al.* [1998] ECR I-7967, paragraphs 26-27. – It is an issue as such why the Institutions obviously have not taken any additional action so as to publicise the Declarations. It is impossible, or at least excessively difficult to find them on the Internet, notwithstanding that the purpose was to release them to the public. See e.g. Council document 10048/96 (for the Council meeting of 24.9.1996) ‘Statements for entry in the Council minutes’, Addendum 1 (SOC264, CODEC 550), footnote on page 1.

he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind.’(italics added)

Hence, the Court first gave importance to the definition adopted by a Member State. This implies that, in theory, there could be elements altering the relationship between the employer and the worker but which nevertheless would fall under the national definition of the minimum wage. Anyway, allowances and supplements, if first defined as falling outside the minimum wage, altering the relationship between the employer and worker cannot be treated as part of the minimum wage under the PWD. I call this an alteration-clause.

The Court gave the reasons for this decision in a rather succinct way, as follows:

‘40 It is entirely normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage.’

This passage is far-reaching and interesting in many dimensions. First, the reason was not just ‘normal’ but ‘entirely normal’. It was something clear without any reasonable doubt or need of further proof. Second, it states a socio-economic ‘common ground’ in any market economy and, besides, is valid at least throughout the history of minimum wages. Third, the reason is not derived from any law books (or data banks, nowadays) or leading articles of the Treaty but from ‘real life’. Fourth, coming closer to the passage’s consequences (instead of thinking of its roots), the statement with its ‘additional work or work under particular conditions’ clearly covers performance-related pay more broadly than in relation to quality, hence also pay elements in relation to quantity or time. This is of importance even in situations, which are quite common in the Nordic countries, where the remuneration consists of so-called direct performance related pay.¹⁷⁰ In a nutshell: the passage operates with changes in the relationship between employer and worker; it is of labour law.

Given the incorporation of proportionality into the ‘normative complex’ applicable in this case, the substantive outcome in paragraphs 39 and 40 also leads to the question whether there is any trace of a proportionality assessment. No, as the wording makes clear. The Court does not consider whether the outcome goes beyond what is necessary in order to attain the objective of protection of workers. This leads to the conclusion that in ‘entirely normal’ pay cases a real proportionality assessment does not take place, that it would finally be merely a safety valve for the free movement values or against social protectionism. What is clear, however, is the fact that the Court kept here, too, protection of the worker as its yardstick.

The formal outcome in the case was to condemn Germany for infringement since it had not established the ‘alteration-clause’ – with the exception of accepting a general construction supplement as a constituent part of the minimum wage - in its minimum wage instructions before the end of the period laid down in the reasoned opinion of the Commission. However, in reality the Commission mainly lost its case, and, indeed, the Court dismissed the application regarding the alteration-clause. The loss is

¹⁷⁰ See the explanation in section 3.2, *supra*.

just clearer in relation to the original formula in the application: an alleged inclusion into minimum wage of all allowances and supplements paid, even after the posting.

A further direct conclusion is equally clear. In its application the Commission contended that a Member State cannot, as a host state, impose its remuneration structure in comparisons (see paragraph 18; in the application it was the method of comparison). The judgment means that it may do so, although not without limits,. Put the other way round, had the Court affirmed the Commission's application, it would have either required Germany to try to impose the excessively laborious German bonuses (in addition to the minimum wage) or in practice it would have ruined the minimum wage control with respect to workers posted into Germany. This is because the artificial bonuses laid down by the work contracts might not actually have been paid at the end of the contract. The German system is not arbitrary but is *de facto* a simplified (and low-rate) solution to the German terms and conditions applicable. In so doing it does not result in a higher economic burden for foreign service-providers, on the contrary. The system equally fulfils the requirements set up in paragraph 43 of *Arblade* while it is relatively simple and easily accessible.¹⁷¹

One might ask whether there was an alternative way of conceiving the status of Member States as rule-makers on this occasion, hence an independent status outside the judicial control of the ECJ. This would be based, of course, on the wording of second subparagraph of Article 3(1) PWD.¹⁷² The answer is simple, indeed. Namely, given the obligations emanating directly from the Treaty, such exclusion would be impossible by a directive. It would be also fully inconsistent with the fact that it is the PWD, hence EC law, which incorporates the obligation to extend the national minimum wages to posted workers. Furthermore, it would be equally justified to ask what would be the rule-maker status (in pay) of the Member States without the PWD. In that situation the Member States would still not escape the judicial control of the ECJ. In fact there has not been such a case and it will naturally no longer arise given the PWD.¹⁷³ Thus, in sum, the way in which the Court established the position of the Member States as a rule-maker corresponds to that intended by the PWD.

¹⁷¹ We may also state that the judgment respects the German system. By contrast, the treatment of the Belgian minimum wage system in *Arblade*, paragraphs 46-47, without explanation provisionally excluded from the minimum wage the 13th salary month (*timbres-fidélité*) and bad-weather payments for construction workers. Thus, the ECJ applied a flat-rate minimum wage. The exclusion was provisional while the Court, wisely enough, left the final contents of the Belgian minimum wage for the national court to confirm. Judgment *Commission v Germany*, together with PWD, means that the provisional exclusion in *Arblade* belongs now entirely to legal history.

¹⁷² Basing the Member States' exclusion from the judicial control of the ECJ by virtue of Article 137(5) EC is not worth any real consideration. As is natural, there is nothing e.g. in the judgment *Commission v Germany* indicating that such an issue need be raised, let it be considered by the Court. If true, it would have been an issue to be noted *ex officio*.

¹⁷³ The Commission also invoked Article 49 EC. The Court, having established the failure to fulfil the obligations on the basis of PWD, found it unnecessary to examine the action in respect of Article 49 EC (paragraph 42).

3.4 From *Seco* to Alteration Clause - Entirely Normal?

In sports the forthcoming match is always the most important, but in legal reasoning history normally weighs more. Judgment *Commission v. Germany* in a way closes the circle started by *Seco* in 1982 and succeeded by *Rush Portuguesa* (1990), *Vander Elst* (1994), *Guiot* (1996), *Arblade* (1999), *Finalarte*¹⁷⁴ (2001), *Portugaia* (2002) and *Wolff & Müller* (2004). None of these successors includes a passage expressis verbis amending the line of a predecessor, although the Court has shown its capacity to make relevant moves even by omitting references to previous case-law. All this leads to the conclusion that in general terms the Court has developed its line with natural steps: from *obiter dicta* via questions and answers in preliminary rulings to the application and interpretation of the PWD, in the light of the Treaty. However, various assessments exist by scholars as to distinguishing turning points or deviating passages.¹⁷⁵ From today's perspective it seems justified to conclude that while *Seco* (including the basic concept on the contents of the common/internal market, i.e. legitimating state measures – the extension right of minimum wages - against low-wage competition within temporary provision of services) and *Rush Portuguesa* clearly were important for social Europe, *Arblade* was and still is the landmark in case-law, not just in confirming the extension right but particularly in establishing the status of *das Sozial* (i.e. protection of workers, construction workers in particular) in more general terms in the field of the free provision of services, hence in the core of regulating the Internal Market. One can condense the outcome by stating that the protection of workers justifies proportionate restrictions on the free provision of services.

Arblade was, however, a pre-PWD case. In this sense *Commission v Germany* is, if not a landmark, a long-standing statue anyway. It interprets, as does *Wolff & Müller*, the Directive. It is natural to think that the Directive and its appropriate application by the Member States is the source for the formal rewriting (I do not submit it is a substantive change) of the normative complex in which fixing the definition of the minimum wage operates. The rewriting meant declaring the status of the proportionality assessment therein but with protection of workers as its yardstick. Finally the proportionality assessment remains as a safety valve for free market values and against social protectionism. As is 'entirely normal' in the internal market business, not everybody is happy.

This outcome (protection of workers justifies proportionate restrictions) is, of course, also a specification of the contents in Article 50(3) EC: temporary provision of services in another Member State under the *same* conditions as those applicable to

¹⁷⁴ It dealt with the realisation of a part of the extension right, namely holiday pay, and merits to be counted in this continuum. Judgment *Mazzoleni* I comment briefly in footnote 177, *infra*.

¹⁷⁵ Some examples on highlights: both Kolehmainen (op.cit, p. 125-135) and Davies (IJL Vol. 31, No. 3, September 2002, p. 301 et seq.) present *Arblade* as a landmark decision while only Davies really analyses the consequences of the four-fold *Arblade*-test (while he doesn't use this name). Kolehmainen concentrates on the practical application of the justification principles (*Arblade*-test) in that particular case. Giesen, who in general terms accepts the balancing of social protection and fundamental freedoms in case-law (see section 1.3.5, at footnote 79, *supra*), regrets that the extension right in *Portugaia* was left up to the national authorities and courts (see footnote 55, *supra*).

domestic service providers. That proviso, too, must be read in the light of the Arblade-test.

3.5 On Pay Comparisons in General

As mentioned, *Commission v. Germany* de facto decided that the host state is entitled to establish the method of comparison of working conditions, albeit within the limits set by the Treaty. This line drawing still necessitates some further remarks on these comparisons.

However, comparing the national schemes and pay provisions is not an easy task if one takes just time-related wages with their many components. Furthermore, the decision on the practical use of performance-related pay might be simple in a clear majority of cases as in the new construction of buildings (or civil engineering projects) that do not include e.g. new materials, production methods or safety and health aspects requiring time-related remuneration. Normally the collective agreements concerned include the necessary and detailed rules on the use of performance-related pay.¹⁷⁶ Anyway, e.g. comparing a time-related pay scheme to a performance-related one is something that the EC should not impose but should respect the a priori right of the host state concerned to use such a method in remuneration and to set up the rules if a comparison is to be made between a time-related and performance-related scheme.

Putting fine-tuning aside right now we may distinguish two basic methods of comparison: a benefit-by-benefit model and a package model.¹⁷⁷ The German case is a graphic example of the former: hourly wages and holiday remunerations are compared respectively and separately. On the other hand, the agreement between the Dutch and Belgian social partners in construction in 1997 established that there is a sufficient equivalence between the benefit packages in those countries. The agreement at the same time also meant that the social partners and the authorities do not require payments of the separate benefits (in practice: the holiday pay) concerned via the respective social fund in the host country (hence when Belgians work in the Netherlands and vice versa). Instead, in posting situations the companies continue paying via the home state fund. The agreement is equipped with a safety valve including a possibility for individual workers to require a comparison of benefit-by-benefit. This is due to the fact that legislation in both countries is based upon the

¹⁷⁶ It seems that e.g. in negotiations of the on-going Laval case in Sweden the Construction Workers' Union would have accepted that the Latvian workers would carry out the works for an hourly wage, the amount of which is the crucial point. The Swedish collective agreement concerned takes the performance-related remuneration as the principal object of local negotiations in wage setting.

¹⁷⁷ As a third alternative I may mention comparing the annual earnings that Advocate General proposed in the case C-369/96 Arblade [1999] ECR I-8453. The Court in judgment Arblade left it without any reference. Such a comparison includes a lot of vagueness and unsure factors, such as partial unemployment, whose effect makes it finally desktop wisdom. Such comparisons have only a theoretical and extra-judicial knowledge value. – The comparison present in case C-165/98 Mazzoleni [2001] ECR I-2189, including even the impact of taxation and welfare services, deviates from the comparison of gross wages intended by the PWD. However, it was also a sui generis case in the field of frontier work.

comparisons benefit-by-benefit. The package comparison between these two countries is thus an exception in formal terms. The social partners anyway find that the package method in this Belgian-Dutch case gives a feasible and sufficiently reliable application. Individual requests for benefit-by-benefit comparisons have obviously been rare, if they so far exist at all. The Belgian-Dutch agreement is declared binding erga omnes at least in the Netherlands.¹⁷⁸

As mentioned, the *ratio* of the Directive is more in favour of the benefit-by-benefit model. Namely, Article 3(7) refers to more favourable conditions applicable. Furthermore, the Directive in Article 3(1) treats minimum rates¹⁷⁹ of pay (including overtime rates) and paid annual holidays separately. Furthermore, the Declaration No. 9 attached to the PWD refers to comparisons on the basis of remuneration per hours worked. The EFBWW study of 2004 reveals that the comparison of benefit packages strictly speaking applies only between Belgium and the Netherlands. Another issue is that the German social partners (i.e. their holiday pay fund, now called SOKA-BAU) have joined this agreement in the sense that Germany does not require Dutch and Belgian companies, who pay contributions for the holiday pay fund in their respective countries, to pay the contributions in Germany. Accordingly, German companies continue paying contributions in Germany when carrying out works in Belgium or the Netherlands.

The European social partners in the construction industry, EFBWW and FIEC, have noted, after discussions lasting some seven years, the impossibility of imposing a more elaborate European model for the comparisons. Under the heading ‘Bilateral actions in favour of a Europe-wide approach’ they took in their joint statement of 2004 the favourability principle as the starting point, clearly having Article 3(7) PWD and the benefit-by-benefit approach in mind. They further noted that ‘the comparison of labour conditions is complicated because in practice it is comparing apples and oranges.’ They therefore note as a positive development that ‘social partners of several Member States with similar socio-economic developments and structures conclude bilateral agreements to recognize each others’ collective agreements, minimum wages and/or paid holiday schemes.’¹⁸⁰

¹⁷⁸ On this agreement, see e.g. the summarised country report on the Netherlands by Mijke Houwerzijl, in Cremers and Donders (eds.), *The free movement of workers in the European Union. CLR Studies 4* (2004), p. 101. Technically the bilateral agreement has been transferred to a provision of the Dutch collective agreement in construction, subject to the erga omnes declaration; statement of Mijke Houwerzijl on 18 February 2005. As to Belgian law, see the summarised country report by Prof. Dr. Yves Jorens and Filip Van Overmeiren. They refer to the national law of 5 March 2002 implementing the PWD. It de facto repeats the text of Article 3(7) PWD and means a benefit-by-benefit comparison. Ibid, p. 71.

¹⁷⁹ The plural form ‘minimum rates’ (les taux de salaire minimal, Mindestlohnsätze) was meant to be an intentional choice in every language while the Swedish and Danish versions anyway are in the singular (minimilön, mindsteløn).

¹⁸⁰ The joint statement is included in Cremers and Donders (eds.), *The free movement of workers in the European Union. CLR Studies 4* (2004), pp. 138-141; see p. 140, paragraph 7. The social partners also note how ‘between Member States with unequal socio-economic conditions the application of the favourability principle is not so difficult as the best provisions will apply.’

One has to highlight that the comparison is essentially easier in cases where there is a clear difference between benefits applicable in the home and host states, as is the case between the old 15 and the 10 new Member States. Whereas the overall difference between the benefit levels is one to three or four, a discussion like that on the benefit-by-benefit or the package comparison does not really emerge. The best provisions apply. Where it does, the Community, ultimately the Court, would best serve the promotion of free movement of services by guaranteeing that such a comparison is based on objective grounds, as well as taking account of the diverse forms of national practices, in particular in the field of contractual relations (Article 136 EC).

There remains the formal question about overlapping or double payments of employer's contributions to social funds running, above all, holiday pay schemes in several countries. In *Arblade* (paragraph 51 and the second ruling) the Court confirmed that the host state cannot require payments to its fund 'where the undertaking in question is already subject, in the Member State in which it is established, to obligations which are essentially comparable, as regards their objective of safeguarding the interests of workers, and which relate to the same workers and the same periods of activity.' At the same time, the Court left the backdoor open for such an imposition by the host state (paragraph 54) if it confers on workers 'an advantage capable of providing them with real additional protection which they would not otherwise enjoy.' As the Declaration No. 7 attached to the PWD shows, the PWD intended to cover the contributions to the social funds in the host state.¹⁸¹ However, an interpretation based on the Treaty obligations leads to the application of this Declaration in the light of the requirement set up in paragraph 54 of *Arblade*. Real additional protection must exist for justification.

¹⁸¹ The Declarations are e.g. the Council document 10048/96 (for the Council meeting of 24.9.1996) 'Statements for entry in the Council minutes', Addendum 1 (SOC264, CODEC 550).

Chapter IV

On the Right to Strike in EC Law

4.1 Background

As a relevant conceptual remark I denote that, like many other labour law scholars, I use the phrase ‘right to strike’ in its broad sense, hence, as a synonym for ‘industrial action’ and ‘collective action to defend the workers’ interests’. Unless otherwise indicated, therefore the phrase ‘right to strike’ also covers forms of action other than those within a valid contract of employment, such as blockades and secondary boycotts. Thus, sympathy actions are covered, but with the reservation that in this study I pass over the delicate question of cross-border sympathy action. ‘Industrial action’ usually means any form of action threatened or taken by a party in order to protect or promote its interests, which may lead to the disruption of production or economic activities more generally.

The issue of the right to strike in EC law is deeply connected with the topic in my three previous Chapters, i.e. the Posted Workers Directive (PWD). The PWD operates in its Article 3(8) on three types of collective agreements: (i) those declared to be of universal application (*erga omnes*); (ii) those generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and (iii) those concluded by the most representative employers' and labour organizations at national level which are applied throughout the national territory. Agreements type (ii) and (iii) are secondary and subject to additional provisions on equal treatment between domestic and foreign undertakings. It is no secret that type (ii) (national) agreements was intended to cover the Danish-Swedish situation of a *de facto erga omnes* of the collective agreements concerned, due to the high degree of organisation in those countries. The national agreements are in Denmark and Sweden normally complemented with separate company level agreements (substitute agreement; ‘*hängavtal*’) concluded by the national trade unions or their local constituents with the non-organised employer, whether domestic or posting workers from another Member States.¹⁸² The substitute agreement practice is well established in Finland, too. In the Nordic labour law tradition the substitute agreements also incorporate a peace clause with the same effect as that in the principal national agreement.

However, each of these three types of agreement (hence, company level agreements as well) may raise the question about the right to strike in the context of a posting situation, either when striving to reach such an agreement during collective bargaining or in applying it. The inevitable question arises about the protection of the right to strike in relation to the fundamental freedom to provide services in the EU/EEA. I will simplify this reasoning by setting aside the issue of strikes carried out to reach a national collective agreement. One may state in brief that by virtue of the equal treatment principle (Articles 12 and 50(3) EC) a national trade union obviously may

¹⁸² On the Nordic Collective agreements see e.g. Jonas Malmberg, *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, in Peter Wahlgren (ed.): *Stability and Change in Nordic Labour Law*. *Scandinavian Studies in Law*, Vol. 43, Stockholm 2002, pp. 189-213; on substitute (accession) agreements pp. 196-7.

also direct its industrial action against a foreign employer posting workers. This leads us to concentrate on industrial action in support of claims on a substitute agreement.

Even if the right to strike were to be silently inherent in the context of the PWD, its Preamble makes the position clear by stating explicitly in Recital 22 that ‘this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions.’ It expresses the principle and conviction of the Council and Parliament to not interfere in that a priori national law on collective action. It can be seen that this is in line with Article 2(6) of the Maastricht Agreement on Social Policy, now enshrined in Article 137(5) EC, according to which ‘(t)he provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.’ I will come back to this provision later in my reasoning. Anyway, the PWD applies as an elaborating instrument in the legal framework of the Treaty, particularly in the framework of Articles 49 and 50 EC. Hence, in trying to answer the question about the relationship between the right to strike and the freedom to provide services a preliminary issue that needs to be discussed is whether Articles 49 and 50 EC do have a horizontal direct effect; whether they can be relied on in industrial action disputes between private parties. Indirectly this question does also cover the question about the compatibility of national strike rules with the EC Treaty. Both questions have become subject to a preliminary ruling of the ECJ in the case C-341/05 *Laval un Partneri* (hereinafter ‘*Laval*’), where the Arbetsdomstolen (Labour Court of Sweden; a single national instance for collective labour disputes, collective agreements included) has decided to request it. In shaping this legal complex under EC law one has to distinguish carefully between the rules on priority of collective agreements (see the reference question B below) that at the same time also regulate the applicability of the statutory peace clause (the Swedish *lex Britannia*) and their application in concrete cases.¹⁸³

¹⁸³ (Interim) Decision 49/05 of the Arbetsdomstolen (Labour Court of Sweden) on 29 April 2005 (www.arbetsdomstolen.se) in the case *Laval un Partneri Ltd v. Svenska Byggnadsarbetare-förbundet* (Swedish Building Workers’ Union), Svenska Byggnadsarbetareförbundet, avdelning 1 (the union’s local department No 1), and Svenska Elektrikerförbundet (Swedish Electricians’ Union). The Latvian company claims with its suit that the Building Workers’ Union, its local department No. 1 and Electricians’ Union have resorted to industrial action incompatible with Article 49 EC and are liable for damages. The company had posted workers from Latvia to Sweden and paid some 30-50% of the viable Swedish wages. The Building Workers’ Union urged the company to sign a substitute collective agreement, with the Swedish level of wages and benefits. The company refused and the union resorted – after many negotiations - to industrial action (boycott and blockade) concerning the construction site in Vaxholm, supported by the Electricians’ Union. The outcome was that the company withdrew from the works concerned but continues the legal proceedings. A sympathy action is allowed under Swedish law if the principal action is legal. The case also involves variable details in the Swedish benefits a priori or allegedly applicable to the workers posted. I leave them aside now and look at the case purely from the perspective of proper wages. I use the expression ‘right to strike’ in describing the events there, although in practice it was industrial action that was more in the form of a blockade that affected electrical installations and various works outside the activities of the company *Laval*. - The second interim decision that includes the reference questions with their (summarized) grounds the Labour Court of Sweden published (in Swedish, only) on 15 September 2005; see <<http://www.arbetsdomstolen.se/pdf/ab133.pdf>>.

4.1.1 First Reference Question in *Laval*; Recital (22) of the Preamble to the Posted Workers Directive

Hence, in its first question the Labour Court of Sweden asks, as follows:

Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services for trade unions to attempt, by means of industrial action in the form of a blockade, to force a foreign temporary provider of services in the host country to sign a collective agreement in respect of terms and conditions of employment such as that set out in the above-mentioned decision of the Arbetsdomstolen, if the situation in the host country is such that the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

The working conditions subject to a targeted substitute agreement were a practical solution based on those prescribed by the national sector-wide collective agreement in the construction industry. The first question requires general argumentation on the contents of the right to strike (industrial action) in EC law. However, I do not present in detail the argumentation of the parties in the *Laval* case in the national court. In general terms, the employer side maintains that the industrial actions concerned are unlawful as violating Articles 12 and 49 EC, as well as the PWD. The first mentioned (Article 12 EC) I take as a corollary argument under Article 49 EC (which I also discuss *juncto* Article 50 EC). The main argument in EC law of the union side has been that the EC is not competent at all to regulate the right to industrial action. I will discuss this issue as a further preliminary question to the right to strike in EC law (see section 4.3). The last mentioned argument (that the action violates the PWD) merits only a brief discussion here, given the recital No. 22 of the Preamble to the PWD, according to which the Directive does not prejudice the national right to ‘collective action to defend the interests of trades and professions’.

This recital was not based on a last minute thought, but resulted from careful consideration during the preparation of the PWD. It was generated especially by the accession of Austria, Finland and Sweden in 1995. As to Sweden, it was also directly linked to the labour market Declaration attached to the Accession Act. It was intended to safeguard – in the form of assurances given by the Commission – ‘the Swedish practice in labour market matters and notably the system of determining conditions of work in collective agreements between the social partners’; see footnote 286, *infra*. This was fundamental in gaining the general public’s support for the accession.

Recapping the recital textually, it is notable that it is not limited to the right to strike *sensu stricto*. It is also intended to cover different lawful sympathy actions that are typical especially in Sweden and Finland. It was also fully in line with the right to strike/industrial action as defined within the ILO (see section 4.4.2, especially at footnote 217, *infra*). Textually the recital leaves no uncertainty about the fate of the ‘PWD argument’ of the company *Laval*; it fails. Contextually the recital’s impact is

clear in principle. When read as a part of the preamble of the PWD, it is essential to see that recitals 1, 2, 3 and 5 link the PWD directly to the completion and functioning of the Internal Market. The principles of the Internal Market are governed by the Treaty. Hence, whereas no secondary EC legislation can overrule the Treaty, the logical conclusion in this broader context is that recital 22 of the PWD does not guarantee any full immunity for national rules on strikes or industrial actions in general.¹⁸⁴ It is also, of course, of value in interpreting the Treaty itself because the reasonable assumption is that secondary legislation is intended to elaborate and in a way to extend the Treaty, but not to contradict it. In conclusion, it is the interpretation of Articles 49 and 50 EC that decides, and not Recital 22) of the PWD.

4.1.2 Second Reference Question: Lex Britannia

The second question of the Labour Court of Sweden deals with the specific structure in Swedish labour law, as follows (my translation):

The Swedish Medbestämmandelagen (Law on workers' participation in decisions) prohibits industrial action taken with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the 'lex Britannia', only where a trade union takes measures in respect of industrial relations to which the Medbestämmandelagen is directly applicable, which means in practice that the prohibition is not applicable to industrial action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition on discrimination on grounds of nationality and the provisions of Directive 96/71 constitute an obstacle to an application of the latter rule - which, together with other parts of the lex Britannia also mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded - to industrial action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?

Hence, lex Britannia means that the prior agreement rule does not cover a foreign company bound by a prior collective agreement abroad, and which therefore is not subject to the Swedish Co-determination Act (that is at the same time the Swedish 'Collective Agreement Act'). In general terms this 'gaining of precedence' is nothing more than the host state law 'gaining precedence' by virtue of the PWD in Member States where minimum wages apply to posted workers directly by virtue of law or an *erga omnes* declaration of a state authority. However, lex Britannia now becomes subject to preliminary ruling on the basis of both discrimination and the Arblade-test – in case that discussion on the horizontal direct effect of Articles 49 and 50 EC first leads to an affirmative conclusion.

¹⁸⁴ Sigeman, professor emeritus in labour law, also notes this; see Tore Sigeman, Fri rörlighet för tjänster och nationell arbetsrätt, Europarättslig Tidskrift 3/2005, p. 481.

4.2 Horizontal Direct Effect of Articles 49 and 50 EC

A natural source in addressing the direct effect issue is the case-law of the ECJ. It started in 1974 with case *Van Binsbergen*¹⁸⁵ where the Court confirmed the vertical direct effect of Article 59 EC. Soon after, in case *Walrave*¹⁸⁶ the Court also extended the direct effect to cover rules of a private law nature. It stated the basics, as follows:

‘16 Articles 7, 48, 59 [now 12, 39 and 49] have in common the prohibition in their respective spheres of application, of any discrimination on grounds of nationality.

17 Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.

18 The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations of organizations which do not come under public law.

19 Since, moreover, working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.’

Hence, Article 49 EC also covers rules of a private law nature. Anyway, the Court, whilst it referred to the risk of inequality, did not discuss inequality stemming from material differences in the rules concerned, whether public or private. However, the conclusion of the Court (paragraph 34 and the ruling) was that the first paragraph of Article 49 EC,¹⁸⁷ ‘in any event in so far as it refers to the abolition of any discrimination based on nationality, creates individual rights which national courts must protect.’

In *Donà v. Mantero*¹⁸⁸ the Court in 1976 confirmed that non-discrimination covered the rules of a private sporting association. It equally confirmed that also Article 60(3)

¹⁸⁵ Case 33/74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid. [1974] ECR 1299.

¹⁸⁶ Case 36/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo [1974] ECR 1405.

¹⁸⁷ Article 49, first paragraph reads: ‘Within the framework of the provisions set out below, restrictions on the freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.’ – As to legal consequences of Walrave, e.g. Andrew Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford 1996 (a revised and updated version of his doctoral thesis of 1991), pp. 249-252, equated them with those of Defrenne II in gender equality at pay (case 43/75 [1976] ECR 455), thus proving within the free provision of services the horizontal direct effect of non-discrimination based on nationality (conclusion on p. 252).

¹⁸⁸ Case 13/76 Gaetano Donà v Mario Mantero [1976] ECR 1333.

EC - at least in so far as it seeks to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a member State other than that in which the service is to be provided - has a horizontal direct effect and creates individual rights that national courts must protect (paragraph 20). According to Article 60(3) (now 50(3)) EC

[...] ‘the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions* as are imposed by that State on its own nationals.’ (emphasis added)

In delimiting the reach of the free provision of services the Court used the economic nature of the activities as the very yardstick. Sports activities fell under the prohibition in so far as they were of economic nature while purely sporting interests fell outside (paragraph 19).

In 1977 in case *van Ameyde*¹⁸⁹ the Court further confirmed that ‘for discrimination to fall under the prohibitions contained in [...] articles [52 and 59] it suffices that such discrimination results from rules of whatever kind which seeks to govern collectively the carrying on of the business in question.’ The case concerned the operation of the so-called green card system in vehicle insurance.

In case *Bosman*¹⁹⁰ the questions for preliminary ruling concerned only the interpretation of Article 39 (ex 48) EC, more particularly the transfer rules of professional football players. However, the Court (in 1995) in its reasoning (paragraphs 83 and 84) repeated the essential points in paragraphs 18 and 19 of *Walrave*, quoted above.

In judgment *Deliège*¹⁹¹ the Court again and with main proceedings in the field of the free provision of services confirmed the principles in *Walrave* (paragraphs 17 and 18) and *Bosman* (paragraphs 82 and 83). Most recently the Court (in 2002) in *Wouters*¹⁹² did the same and stated, also this time within the framework of the free provision of services, as follows:

¹⁸⁹ Case 90/76 S.r.l. Ufficio Henry van Ameyde v S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI) [1977] ECR 1091, paragraph 28.

¹⁹⁰ Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-4921. Referring to judgments *Walrave* and *Bosman*, Bruno de Witte notes that the fundamental freedoms in the common market exceptionally have the horizontal direct effect, thus regarding the collective regulation by private organizations, such as a sports federation. Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in Philip Alston et al. (eds.), *The EU and Human Rights*, Oxford University Press 1999, p. 874.

¹⁹¹ Joined cases C-51/96 and C-191/97 Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97) [2000] ECR I-2549, paragraph 47.

¹⁹² Case C-309/99 J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap ECR [2002] I-1577.

120. It should be observed at the outset that compliance with Articles 52 and 59 [now Articles 43 and 49] of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons [and to free provision of services ¹⁹³] would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17, 23 and 24

¹⁹³ As a lapsus the English version does not refer in this sentence to the free provision of services. The French version does (as the Dutch, Swedish etc.). Taken substantively, the wording of the first sentence – while it refers only to collective regulation of self-employment and the provision services but not to paid labour – may provoke a misleading interpretation. Namely, that the horizontal direct effect of Article 49 (and that of Article 43) would *a priori* not cover the collective regulation of terms and conditions of employment. Such an interpretation falls, first, due to the simple fact that the Court referred to paragraph 17 of *Walrave* (that also includes ‘regulating in a collective manner gainful employment’). Second, the context in *Wouters* proves the fully unconvincing nature of such an interpretation. Namely, the case dealt with the possibility of prohibiting a lawyer-accountant partnership in national law - without the prohibition being i.a. in breach of Articles 43 and 49 EC. While lawyers of course may act both as independent economic actors (respectively as members of such a coalition of lawyers) and as salaried employees (‘workers’ in terms of the Treaty), any formal decision on such a partnership certainly falls under the business powers of the employer. In their respective last answers both the Advocate General Léger (Opinion of 10 July 2001, relying on ‘lawyers’ independence and professional secrecy’ in the work of ‘lawyers practising’) and the Court (relying on the ‘proper practice of the legal profession’ BUT defining the lawyers as ‘Members of the Bar’) allowed such a national prohibition. However, and this is my third point, AG ‘for the sake of completeness’ discussed (in paragraphs 48 to 55) in brief the nature of lawyers’ activities and also distinguished (in paragraph 52) a third category: ‘Second, it may happen that lawyers do not really work under their employer’s direction and that their remuneration is directly linked to the latter’s profits and losses. In that case, lawyers belong to the borderline categories mentioned by Advocate General Jacobs in his Opinion in *Pavlov*’. However, lacking a precise question and sufficient information on the status of salaried lawyers in the Netherlands, he reasoned further – as did the Court – only on the basis that lawyers are undertakings in the sense of Article 81(1) EC. Anyway, in reasoning for his last answer, he characterised (in paragraph 234 which corresponds to para. 120 of the judgment) Articles 43 and 49, as follows: ‘Let me make the preliminary observation that the Treaty provisions on freedom of movement for persons and the free movement of services are not applicable only to measures taken by the public authorities. They also extend to measures of another kind which seek *to regulate, collectively, the employment of workers* and the provision of services. Articles 52 and 59 of the Treaty may therefore apply to rules adopted by associations or bodies such as professional associations.’ (my emphasis). The AG referred to *Walrave*, *Donà*, *Deliège* and *Angonese* (while the Court replaced *Deliège* by *Bosman*, obviously by reasons not relevant in this reasoning). The inevitable conclusion is that the Court – while it accepted the national ban of partnership between members of the Bar (not ‘lawyers practising’!) and accountants – by omitting a reference to paid labour in its paragraph 120 of *Wouters* did not grant any general exception for paid labour from the horizontal direct effect of Article 49 (or from that of Article 43). In *Wouters* it took no position in that respect. - As to the interpretative value of the AG’s opinion in this particular question, see the qualification by Ole Due in footnote 14, *supra*.

[¹⁹⁴]; Case 13/76 *Donà* [1976] ECR 1333, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 32 [¹⁹⁵]).

This case-law is settled and conclusive in the sense that Article 49 (ex 59) EC has the horizontal direct effect on *collective* regulation of terms and conditions of employment. It may thus be invoked, within these limits, in judicial proceedings between private parties. It would be artificial to maintain that an industrial action striving to achieve collective regulation would escape the direct effect because the action itself is not a regulatory measure. Such a plea would artificially detach the action from its purpose and is therefore not convincing as a justification. Another issue is that there might be actions without any regulatory purpose, such as political ones or those directed against (or for) a purely business decision that formally belongs to the employer's discretion. Their justification I leave aside now. As to Article 50(3) EC, there is only one judgment (*Donà*) showing its direct horizontal effect concerning discrimination on the grounds of nationality but it was, however, delivered in 1976 by the Court sitting with seven judges. There is no reason that Article 50(3) EC should have lost its character as having the horizontal direct effect, at least concerning discrimination. I therefore conclude that Article 50(3) EC also has the horizontal direct effect, nowadays obviously at least within the scope of Article 13 EC.

4.2.1 Reach of Horizontal Direct Effect of Articles 49 and 50 EC

The scope of EC law is not unlimited. The Community is based on conferred powers. I will first try to illustrate in brief the limits of Articles 49 and 50 EC as it appears from case-law so far.

The Court most recently discussed these limits in the sports case *Deliège* and concluded that sporting is subject to 'Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty'.¹⁹⁶ Furthermore, the concept of economic activities may not be interpreted restrictively¹⁹⁷ and, according to settled case-law, the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the Treaty.¹⁹⁸ Hence, everything included under

¹⁹⁴ This time the Court also referred to paragraphs 23 and 24 of *Walrave* where it had linked the scope of Article 59 (now 49) EC to that of Article 48 (now 39) EC.

¹⁹⁵ Judgment *Angonese* concerned the free movement of persons.

¹⁹⁶ Paragraph 41. The ECJ referred to *Walrave*, paragraph 4, and *Bosman*, paragraph 73.

¹⁹⁷ *Deliège*, cited above, paragraph 52, with the reference to Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 13.

¹⁹⁸ *Deliège*, paragraph 53, where the Court referred to judgment *Donà*, cited above, paragraph 12, and Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, paragraph 10. Further in this sense, e.g. in Case C-275/92 *Schindler* [1994] I-1039, paragraph 19, where the ECJ, referring to *Donà* and *Steymann*, confirmed that lotteries are "economic activities". Similarly, thus indicating the broad meaning of 'economic activities', judgment *Jany* stated how (self-employed) prostitution is a provision of services for remuneration which falls within the concept of economic activities; Case C-268/99 *Jany et al.* [2001] ECR I-8615, paragraph 48. In the same judgment the ECJ stated that it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral

the heading of economic activity is subject to EC law and may at the same time be a *prima facie* forbidden restriction on free provision of services. It is self-evident that strikes will not fall outside EC law on the supposed grounds that they are not economic activities and are at most just social activities or something similarly ‘non-economic’, since they are aimed at stopping or hindering such activities. Otherwise we know on the basis of e.g. *Steymann* that, to fall under economic activity, it is sufficient for something to be of genuine and effective work and not such as to be regarded as purely marginal and ancillary.¹⁹⁹ However, we may conclude that a strike may fall outside EC law due to its marginal or ancillary nature. It is a kind of a natural *de minimis* principle and obviously applicable under both EC and national law.

In *Deliège* the Court concluded that a certain sporting rule does not in itself, as long as it derives from a need *inherent* in the organisation of a competition, constitute a restriction on the freedom to provide services under Article 59 (now 49) of the EC Treaty. In this way the Court set up an essential limit. In *Society for the Protection of Unborn Children v Grogan* the Court found that the prohibition of abortion, enshrined in the Irish constitution, fell outside the scope of EC law and did not assess it the light of Articles 49 and 50 EC. It also protected information on legal abortion abroad only in so far as the clinics concerned were involved in the distribution of information.²⁰⁰ The Court did not discuss at all the effect of freedom of expression, enshrined in Article 10 of the European Human Rights Convention. The doctrine has widely criticized this.

However, as these two examples show, in assessing the status of a strike in EC law a further preliminary question is whether it falls within the ambit of EC law at all, more particularly under Articles 49 and 50 EC. Only if it does, can the legal question arise about restricting the free provision of services and about its possible justification.

4.3 Right to Strike in the Ambit of EC Law?

What does the Treaty say about the right to strike? Are there relevant delimitations of EC competence regarding other matters?

First, the Treaty of Rome said nothing directly about the right to strike, but it did oblige the Commission in Article 118 to encourage cooperation between the Member States particularly in the fields of labour law and working conditions, as well as in matters relating to the right of association and collective bargaining. However, the inherent assumption was that the Council was not expected to act in these fields. Besides, the Treaty of Rome in Article 2 stated that the leading task of the Community was to promote ‘harmonious development’ of economic activities and also ‘accelerated raising of the standard of living’; the Treaty of Maastricht qualified economic activities with their ‘harmonious and balanced’ developments (which is now ‘harmonious, balanced and sustainable’). Article 118b EEC, inserted by the Single European Act, referred to ‘relations based on agreement’ between management

activity is practised legally (paragraph 56). However, in *ordre public* (public policy) issues a national margin of discretion exists.

¹⁹⁹ *Steymann v Staatssecretaris van Justitie* (see the previous footnote), paragraph 13.

²⁰⁰ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685.

and labour at the European level (which is now situated in Article 139 EC). Then, outside the Treaty of Maastricht, the 11 Member States in their Social Policy Agreement (Article 2(6)) stipulated that the provisions of that Article ‘shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs’. This provision was later incorporated into the Treaty of Amsterdam as Article 137(6) EC and the Treaty of Nice just changed the number to 137(5). It is the only place where the Treaty mentions expressly the right to strike. Second, according to Article 137(2) and 137(1)(f) EC, the Community may issue unanimous directives on ‘representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5’. This provision is accordingly copied from Article 2(3) of the Maastricht Social Policy Agreement. Third, a particularly relevant peg in the Treaty is Article 95(2) EC, enshrined by the Single European Act, which excludes ‘provisions relating to the rights and interests of employed persons’ from qualified majority voting. Fourth, there is no clause in the EC Treaty excluding any European harmonisation of strike laws as there is, with slightly variable material contents, in the case of education (Article 149 EC), vocational training (Article 150 EC), culture (Article 151 EC) and public health (Article 152 EC). The Treaty of Maastricht added these provisions. Fifth, regarding the right to strike there is no exclusion as there is, since the Treaty of Rome, for national systems of property ownership (Article 295 EC), national security and trade in arms, munitions and war materials (Article 296 EC) and for exceptional security circumstances (Article 297 EC).

There are two main avenues to interpret the Treaty at this point and, more particularly, Article 137(5) EC.²⁰¹ A ‘constitutional’ interpretation line goes that Article 137(5) is intended to exclude all the matters referred to there from the competence of the EC, or to demonstrate such exclusion.²⁰² Article 2 of the so-called Monti-Regulation

²⁰¹ As to the different interpretations on Article 137(5) EC especially regarding pay, see Hellsten 2004 (footnote 142, *supra*), *passim*.

Lord Wedderburn has held – immediately after Maastricht – that a Community instrument on freedom of association would be possible on the basis of Article 94 (ex 100) EC. It implies that the right to strike is not ‘constitutionally’ excluded from the Community competence by Article 137(5) EC. Lord Wedderburn, *Freedom of Association and Community Protection: A Comparative Enquiry into Trade Union Rights of the European Community and into the Need for Intervention at the Community Level*, May 1992, paragraph 35.1; a stencil for the European Commission – never published that I know of. I also refer to Lenaerts and van Nuffel who have written how regarding pay, freedom of association and rights to strike and lock-out ‘no reliance may be made on Article 137 (paragraph 6)’. Lenaerts and van Nuffel (ed. Bray), *Constitutional Law of the European Union*, 1999, p. 229.

²⁰² There is, of course, a close tie between pay and the right to strike. I recall how the Danish and Swedish versions of Article 137(5) EC refer to ‘pay relations’ (*lønforhold*, *löneförhållanden*) which in the Danish and Swedish labour market context – with an emphasized status of collective agreements – feeds the interpretation that Article 137(5) EC defines and excludes the overall EC competence in these relations, strikes included. Textual support this argument finds in the wording of Article 137(1)(f) (ex 137(3)) that refers to issuing directives on representation and collective defence of the interests of workers and employers, including co-determination, *subject to paragraph 5*.

On this ‘constitutional’ interpretation regarding pay, also see Lena Maier (footnote 88, *supra*) pp. 275-285. Her own conclusion anyway is that it is unclear whether Article 137(5) EC excludes community competence under other Treaty provisions; p. 422 (p. 461 in the English summary). In ‘Utstationering av arbetstagare och det svenska kollektivavtalssystemet. En

2679/98 and Recital 22 in the Preamble to the PWD, both with references to national law regarding strikes or fundamental rights, are also explained then as reflections of this constitutional exclusion. Continuing this line, the legality of a strike is subject only to national law (or international obligations of the Member States). Hence, an extreme constitutional interpretation of Article 137(5) would mean holding that the right to strike falls entirely outside the legislative competence of the EU. It would on this basis be consistent to hold that a strike (like national strike rules), due to Article 137(5) EC, falls equally outside the scope of Articles 49 and 50 EC. No further discussion about the limits or application of these provisions in this context would be needed. However, such an interpretation (i.e. the entire lack of legislative competence

rättslig analys' (SACO 2005) she concludes that Article 137(5) EC does not guarantee a full immunity for strikes and national strike law in relation to EC law; pp. 53-54. Further in the Swedish discussion, noteworthy is that Jonas Malmberg has denoted the lack of strike cases in the ECJ without any reference to Article 137(5) EC: Malmberg, *Metoder att motverka låglönekonkurrens i Sverige* (Methods in opposing low wage competition in Sweden; exists only in Swedish) in Malmberg (red.) *Låglönekonkurrens och arbetstagares integritet*, Arbetslivsinstitutet 2000:2, p. 19. Tore Sigeman has denoted that Article 137(2) and (5) EC do not, as a logical consequence, rule out Community competence in matters covered by Article 137(5) EC under Article 94 EC. He states that, whatever is the regulatory competence of the Council of Ministers regarding industrial action, the ECJ does not seem to be prevented from judging various private (industrial) actions in relation to the four market freedoms and nationality-based discrimination. As grounds he refers to cases C-265/95, *Commission v. France*, and C-112/00, *Schmidberger*; see Sigeman, footnote 184, *supra*, pp. 481-2. In German literature Birk has firmly expressed the argument that Article 137(5) EC cannot be assumed to be a guarantee of the national right to strike in relation to fundamental economic freedoms in the EC Treaty just because it does not exclude the right to strike from the Treaty; see Rolf Birk, *Arbeitskampf und Europarecht*, Oetker et al. (Hrsg.), 50 Jahre Bundesarbeitsgericht, Münchner Beck 2004, pp. 1165-1178, especially pp. 1166-8. I take the liberty to denote Birk's basic position – let it be an initial one, concerning “a widely unwritten page” (ibid., p. 1165) - on the right to strike in EC law. Thus, he finds that, when we take into account the several concrete references to that right in the relevant European documents (the 1989 Community Charter of Fundamental Social Rights of Workers, reference to European Social Charter in Article 136 EC and the EU Charter of Fundamental Rights of 2000), the starting point must be that there exists “already today” (i.e. in 2004) a right guaranteed (,verbürgt’) in EC law. In the next phrase he refers to the use of that right within the limits of proportionality and in a legal field where the fundamental freedoms in the Internal Market are not unlimited (ibid., p. 1177). Proportionality and limiting the fundamental market freedom will be discussed especially in sections 4.9 and 4.10., *infra*. The European Social Charter is presented in section 4.4.4, *infra*, and it is dealt with more fully in footnote 294, *infra*. Novitz has reiterated the position that Article 137(5) EC excludes the matters concerned from the Community's regulatory competence and, as a ground, refers to the principle that a specialized treaty base should prevail; as a conclusion she predicts that there is ‘little to protect this entitlement from progressive erosion’ by the market freedoms. See Tonia Novitz, *The Dialogue between the EU and ILO*, in Alston (ed.), *Labour Rights as Human Rights*, Oxford University Press 2005 (Novitz 2005), p. 218-9. To be fair, one has to remember that Novitz regards EC regulation in principle as possible (although unlikely) under Articles 94 or 308 EC; *ibid*. The essential point is that Novitz does not discuss the situations where the ECJ has to strike a balance between market freedoms and the right to strike. If nothing else that at least reveals how Article 137(5) EC does not conceal a solid escape and/or delimitation of the Community competence. The lessons from cases 283/81 *CILFIT* [1982] ECR 3415, paragraph 20, and *Albany*, paragraph 60, show us that Article 137(5) EC must be interpreted finally in the light of an effective and consistent interpretation of the EC Treaty as a whole.

with respect to strikes on the part of the EU) would not solve all the essential problems. Accordingly, it would not be consistent. Even a strike which is perfectly and undoubtedly legal under national law (as when the collective agreement concerned has expired) may certainly be in conflict with EC market freedoms (including the free movement of workers) that have a horizontal direct effect, or with equally effective non-discrimination provisions in Articles 12 and 13 EC. It is evident, finally by virtue of *effet utile* and primacy of EC law, that the supposed prerequisite of a lacking legislative competence, based on Article 137(5), would not *a priori* and as such exempt all the nationally legal strikes from the possible effect of the EC law concerned. Such strikes are within the scope of the Treaty. It then also means de facto a debate (or, judgment!) about the (basic) contents of the right to strike under this EC law (I will discuss it later in this chapter). Hence, even the constitutional interpretation of Article 137(5) does not free us from discussing the contents of the right to strike under EC law with the horizontal direct effect.

The other interpretation line takes as its basis the whole Treaty and reads Article 137(5) EC literally which leads to the conclusion that an EC intervention in strike law would be possible with another legal base, such as Article 94 or 308 EC, or based on the agreement of the European Social Partners.²⁰³ This interpretation line explains Article 137(5) EC merely as a demonstration of the reluctance of the Member States to enact any EC strike directive without in any way excluding the issue as a whole from the formal competence of the Community. On this interpretation line as well, the material contents of the right to strike remain essentially national or subject to international treaties (see section 4.4 et seq., *infra*) while EC law implies mainly a principal protection of the right to strike in relation to the market freedoms and proper competition rules. Article 28 of the EU Charter of Fundamental Rights is also a demonstration of this basic protection under EC law, with an expressed reference to it (see further section 4.4.6, *infra*).

That the right to strike falls under EC competence has particularly the following additional grounds at the Treaty level. First, the location of labour law and working conditions in Article 118 EEC did not prevent the Community from enacting the labour law directives on Collective Redundancies and Transfer of Undertakings in the 1970s. Second, Article 95(2) (ex 100a(2)) EC excludes ‘provisions relating to the rights and interests of employed persons’ expressly from qualified majority voting, not from the Treaty. Use of Article 94 (ex 100) in the 1970s as a basis for labour law directives naturally was behind this delimitation of qualified majority voting. Third, Article 2(6) of the Maastricht Social Policy Agreement essentially was a late attempt to get the United Kingdom to accede to that agreement. Fourth, essential is that while Maastricht’s Article 2(6) was enacted outside the Treaty, it would be even illogical to argue that it would somehow restrict the scope of the original Treaty or that reflected by Article 95(2) (ex 100a). Its incorporation into the Treaty of Amsterdam was rather a political compromise than a legal exclusion. Fifth, the PWD regulates pay and collective agreements in a cross-border context and for its part shows the

²⁰³ On the same line (a directive on the right to strike is conceivable under Articles 94 or 308 EC; the author shares this view) writes Tonia Nowitz, too, in her dissertation *International and European Protection of the Right to Strike*, Oxford University Press, 2003, p. 162. Anyway, her previous conclusion is that ‘the members of the EU seem to have denied that organization the competence to adopt directives relating specifically to ‘the right of association, the right to strike or the right to impose lockouts’; p. 33.

unconvincing nature of the constitutional interpretation of Article 137(5) EC. Sixth, Article 136 EC refers to the European Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers, and both of them include the right to strike. Seventh, Article 28 of the EU Charter of Fundamental Rights of 2000, including the right to strike, would be meaningless for EC law if the constitutional exclusion by Article 137(5) EC were valid. Finally, nothing in or around Article 137(5) EC shows that it would invalidate the effect of international law, either under Article 307 EC or by virtue of general international law. I will discuss these below in sections 4.5 and 4.6.

The forthcoming *Laval* case in Sweden obviously means that the ECJ has also to take stock on Article 137(5) EC. It seems likely, however, that the ECJ will not embrace the constitutional interpretation thereof, probably with some additional grounds linked to its own position. First, the constitutional interpretation would drop essential internal market ‘interferences’ from the control of the ECJ which militates against its mission as the guardian of the Treaty, including the principles of primacy of Community law and uniform application of the *acquis*. Second, as the judgment *Schmidberger* shows, the ECJ has without any doubt determined itself competent to judge, in an internal market context, on fundamental rights (freedom of expression and freedom of assembly) guaranteed in the ECHR.²⁰⁴ Another issue is how the ECJ will express its grounds in judicial language, case-law included. The experience of the sports judgments (*Walrave, Donà* and *Deliège*) shows that the Court may confine itself to a laconic statement based on the concept of economic activities in the sense of Article 2 EC: a strike within the sphere of economic activities is subject to EC law. This kind of line drawing would mean that not all aspects of the right to strike would fall under EC law. As in the case of pure sporting interests,²⁰⁵ there is certainly at least the policy and internal decision-making of trade unions that fall outside the judicial control of EC law and courts.²⁰⁶ Anyway, it seems necessary to reason further on the basis that the ECJ, despite Article 137(5) EC, will deem itself competent and compelled to judge on the right to strike in the framework of the free provision of services.

²⁰⁴ Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659, paragraphs 71-94. - I use the abbreviation ‘ECHR’ for the European Convention for the Protection of Human Rights and Fundamental Freedoms and ‘EHRC’ for its Court (like ‘European Human Rights Court’).

²⁰⁵ In this sense, see case T-313/02 David Meca-Medina and Igor Majcen v Commission of the European Communities, judgment of 30.9.2004, nyr, paragraphs 53 and 63 et seq. The keywords were Competition - Freedom to provide services - Anti-doping legislation adopted by the International Olympic Committee (IOC) - Purely sporting legislation. The Court of First Instance concluded that anti-doping rules are of pure sporting interest and fall outside Community law. The basis of its assessment it defined, as follows (paragraph 42): ‘Conversely, legislation which, although adopted in the field of sport, is *not purely sporting* but concerns the economic activity which sport *may* represent falls within the scope of the provisions both of Articles 39 EC and 49 EC and of Articles 81 EC and 82 EC and is capable, in an appropriate case, of constituting an infringement of the liberties guaranteed by those provisions (see, in that regard, the Opinion of Advocate General Lenz in *Bosman* at I-4930, paragraphs 253 to 286, and particularly paragraphs 262, 277 and 278 EC [...])’; my emphasis. The judgment is subject to appeal (see case C-519/04 P) - obviously in vain.

²⁰⁶ See Article I-48, too, of the Constitutional Treaty. The context also involves a question about political strikes, which is not explored here.

4.4 On Protection of the Right to Strike in the Context of EC Law

4.4.1 General Remarks

I first denote the right to strike as presumably a fundamental right in EC law. Such rights enjoy a special status in the legal order of the Community²⁰⁷ that the Court e.g. in the recent judgment *Omega Spielhallen* expressed as follows:

33 [...] according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect [...].²⁰⁸

Hence, fundamental rights are protected as an integral part of general principles of law and in protecting them the Court draws on common constitutional tradition and relevant international treaties. It is also plausible that the Charters adopted within the Community, next to national constitutions, reflect the common constitutional tradition. On the other hand, international treaties giving (only) guidelines do not bind the Court which i.a. means that the Court with respect to strikes is not bound by the weak (and old) letter of the ECHR that recognizes only the freedom of association. The Court naturally takes into account the supervisory practice and jurisprudence of the international treaties. I will return to this below.

However, under this heading I will give only a necessary overview, with some subject-related comments concerning the ILO instruments and the EU Charter of 2000, on the international and EC law instruments governing either the freedom of association or directly the right to strike. Regarding international instruments, I would generally refer to the presentation by Tonia Novitz in her dissertation.²⁰⁹ At an EC

²⁰⁷ On the development and status of fundamental rights in the legal order of the Community see e.g. Tuomas Ojanen, *The European Way. The Structure of National Court Obligation under EC Law*, Gummerus Kirjapaino Oy, Saarijärvi 1998, pp. 97-136 and 291-324. As to a conceptualizing overview, see e.g. Allan Rosas, *The Legal Sources of EU Fundamental Rights: A Systemic Overview*, in Colneric et al. (eds.), *Une communauté de droit. Festschrift für Gil Carlos Rodríguez Iglesias*, Berliner Wissenschafts-Verlag Berlin 2003, pp. 85-102.

²⁰⁸ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, judgment 14.10.2004, nyr. The following case-law was this time cited in paragraph 33: Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 *P Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71.

²⁰⁹ Tonia Novitz, *International and European Protection of the Right to Strike*, Oxford University Press 2003. My presentation also draws generally on Olavi (Olli) Sulkunen, *Kansainväliset ammattiyhdistysoikeudet* (International Trade Union Rights), Helsinki 2000, XXXIX + 674, with an English summary. I also refer to Olavi Sulkunen, *Ammattiyhdistysoikeudet Euroopan yhteisön oikeudessa* (Trade Union Rights in EC Law), *Työoikeudellisen yhdistyksen vuosikirja 1999-2000*, pp. 55-195 (exists only in Finnish). In the latter Sulkunen does not, however, discuss trade union rights in the specific context of the

level the issue (right to strike/industrial action v. fundamental freedoms in the internal market) is naturally particularly complicated due to the diversity of strike laws in the Member States.²¹⁰ Therefore, and for space reasons, I have to confine myself to presenting only the basics, followed by shaping a likely or possible application line in EC law, especially in the field of the free provision of services.

free provision of services. The same concerns Novitz (and Germanotta, see *infra*). More generally, Sulkunen has not dealt with the status of ILO provisions in EC law by virtue of Article 307 EC or general international law in doctrine while he well mentioned Article 307 in spring 2005. He died on 13 May 2005. Novitz refers to pre-existing obligations of the Member States in a couple of sentences, p. 31 and 152 (the latter also referring to denunciation of these obligations when incompatible with the Treaty); Paul Germanotta and Tonia Novitz, *Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action*, *IJLLIR* Vol. 18/1, 67-82, 2002, p. 79, do refer to transposition of ILO norms into the EU as consistent with EU external relations policies (see footnote 220, *infra*) but, graphically, without any reference to Article 307 EC or general international law. As one of the rare references made to the fundamental right to strike in EC law I may mention Giovanni Orlandini, *The Free Movement of Goods as a Possible 'Community' Limitation on Industrial Conflict*, *ELJ*, Vol. 6, No. 4, December 2000, pp. 341-362. His starting point (p. 341) is that Article 137(5) EC excludes the right to strike from EC competence but it doesn't prevent him – without further normative grounds – from referring to its protection under EC law as a fundamental right. This he also does, however, by presenting the 'reasonableness' of appeal to it as one of its criteria (which Novitz, p. 254-5, accepts without comments). I denote an overriding difficulty in deriving such an *overall* criterion from both the formula in Omega Spielhallen, para. 33, and the legal framework in accepting restrictions on fundamental rights, applied e.g. in case Schmiedberger (which I explore below in section 4.10.1), let alone under Article 307 EC or general international law (which I explore in sections 4.5 and 4.6). There is, of course, less space for criticism in case that this 'reasonableness' in fact means the principle of proportionality. That is relevant, indeed, regarding the specification of restrictions on fundamental rights and market freedoms as case Schmiedberger shows.

²¹⁰ It is common ground that, among the old EU Member States, in Southern and Central Europe the right to strike is primarily an individual right (with the exception of Greece); in Northern Europe it is organic, hence belonging to the organisations. An outlining description is e.g. in Brian Bercusson, *Trade Union Rights in the 15 EU Member States of the European Union* (by the European Parliament, EU's Publications Office 1998). As to sympathy (solidarity) strikes the picture is more varied; see e.g. Niklas Bruun and Bruno Veneziani, *The Right or Freedom to Transnational Industrial Action in the European Union*, in *A Legal Framework for European Industrial Relations*, ETUI, Brussels 1999, pp. 77-88. A broader presentation is given by Juri Aaltonen, *International Secondary Action in the EU Member States*, Finnish Metalworkers' Union, Espoo 1999. An international overview is also e.g. in A.T.J.M. Jacobs, *The Law of Strikes and Lockouts*, in Blanpain and Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer Law Int. 2001, pp. 585-628. The need for a principal regulatory measure on the right to strike he identified already in 1978; he referred as an example to the Hersant Group case. This publisher transferred the printing of three newspapers to Belgium, following a strike in France; see Antoine Jacobs, *Towards Community Action on Strike Law?*, *CMLRev.* 1978 Vol. 15, pp. 133-155, especially at 142 and 155. He also presents the answer of the Commission to a parliamentary question: 'the principle of freedom of establishment neither affects nor is affected by the right to strike'; p. 142.

4.4.2 ILO Provisions

As a first step it is essential to note that the international treaties concerned include the ILO Constitution, the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise 1948 and the ILO Convention No. 98 on the Right to Organise and Collective Bargaining 1949. The ILO Declaration on Fundamental Principles and Rights at Work,²¹¹ adopted in 1998, is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values - values that are vital to our social and economic lives. It stated the commitment of the ILO Member States to respect, to promote and to realize, in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental rights, such as freedom of association and the effective recognition of the right to collective bargaining (paragraph 2(a)). The former is also enshrined in the Preamble to the ILO Constitution, the latter in the Philadelphia Declaration of 1944, annexed to the Constitution.

The letter of Article 3(1) of Convention No. 87 does not spell out the right to strike but the freedom of association, as complemented by the right of the trade union organizations 'to organize their activities' and 'to formulate their programmes'. However, derived from these formulas in the supervisory practice the right to strike has been recognized for decades.²¹² As developed, this right is regarded as 'an intrinsic corollary of the right of association protected by Convention No. 87'²¹³ and as 'one of the essential means through which workers and their organizations may promote and defend their economic and social interests'.²¹⁴ Hence, the 'ILO right to strike' means a civil, political and socio-economic entitlement.²¹⁵ It is also clearly free from restrictions set up by the existing working relationship which would impose limits on the protection of the right concerned. It is the right of the workers' organizations²¹⁶ and, as also linked to the right to establish and join federations and

²¹¹ The Declaration is available <<http://www.ilo.org/ilolex/english/index.htm>>.

²¹² Further support for the right to strike is in Articles 8 (organisations have to respect the law of the land which shall not impair the guarantees provided for by the Convention) and 10 of the Convention ('organisation' means any organisation of workers or of employers for furthering and defending the interests of workers or of employers). On the evolution of the ILO practice in general, see e.g. Novitz, p. 185-206; similarly: Lee Swebston, Human rights law and freedom of association: Development through ILO supervision; ILRev. Vol. 137 (1998), No. 2, pp. 169-192, at 186-7. Bernard Gernigon, Alberto Odero and Horacio Guido (officials of the International Labour Office) also give an overview on the application of the ILO Convention 87: ILO principles concerning the right to strike, International Labour Review, Vol. 137 (1998), No. 4, pp. 441-481.

²¹³ ILO Committee of Experts, General Survey 1994, paragraph 179.

²¹⁴ ILO Committee on Freedom of Association: Digest of Decisions and Principles of the Governing Body Committee on Freedom of Association (Digest), 4th edition, Geneva, ILO 1996, paragraph 475.

²¹⁵ In terms of Novitz, see e.g. her outlook, p. 368, in fine.

²¹⁶ See International Labour Conference 81st Session 1994, Report of Committee of Experts, General Survey, paragraph 149, p. 66. The Committee also found that protection of strikers under the Abolition of Forced Labour Convention 1957 (No. 105) extends to individuals, as does the protection under the UN Covenant on Economic, Social and Cultural Rights (presented later in this article) and the European Social Charter of 1961 (presented later in this article); loc cit., footnote 23. The Committee further noted that while the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87, it cannot be

confederations in Article 5 of the Convention No. 87, also covers sympathy actions,²¹⁷ secondary boycotts included.²¹⁸

considered as an absolute right. It may be ‘subject to a general prohibition in exceptional circumstances’ and ‘governed by provisions laying down conditions for, or restrictions on, the exercise of this fundamental right;’ loc.cit., paragraph 151.

²¹⁷ Ibid., paragraph 168, p. 74. The Committee noted that sympathy strikes are recognized as lawful in some countries. It further noted the need for distinction (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.) but concluded that ‘a *general* prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.’ The 1996 Digest (footnote 214, *supra*), paragraph 489, confirmed that a ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association. It further referred to 284th Report, Case No. 1575, paragraph 911. This essentially repeated the position of the 1994 General Survey (paragraph 168) but also referred to the General Survey of 1983, paragraph 217. Gernigon et al. also report a case in 1987 where a Decree did not ban sympathy strikes but merely regulated them by limiting the possibilities of recourse to this type of action. The Committee on Freedom of Association found that various procedural provisions might be justified (as well as security provisions) but e.g. geographical or sectoral restrictions placed on sympathy strikes – which therefore exclude general strikes of this nature - it found as constituting a serious obstacle to the calling of such strikes; Gernigon et al. (footnote 212), p. 447; Reports of the Committee on Freedom of Association, in Official Bulletin (Geneva), Vol. LXX, Series B, No. 1, 248th Report, Case No. 1381, paragraphs 417-8. As to more recent practice, one may refer e.g. to the complaint of the International Confederation of Free Trade Unions (ICFTU) et al. v. Australia, report No. 320, case No. 1963 (Doc. Vol. LXXXIII, 2000, Series B, No. 1) where the Committee on Freedom of Association requested ‘the Government to take necessary measures, including amending the Trade Practices Act, to ensure that workers are able to take sympathy action provided the initial strike they are supporting is lawful’ (conclusion (d)).

²¹⁸ The 1989 Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 238, stated that ‘(t)he Committee has never expressed any decided view on the use of boycotts as an exercise of the right to strike. However, it appears to the Committee that where a boycott relates to the social and economic interests of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike. This is clearly consistent with the approach the Committee has adopted in relation to ‘sympathy strikes’’. In its Report 2001 the Committee of Experts noted with regret that amendments in Australia’s Trade Practices Act 1974 maintained its boycott prohibitions (p. 206). More recently, and concerning the same law, the 2003 Report of the Committee of Experts, p. 220, expressed again its position on secondary boycotts as a corollary to its position on sympathy action. It ‘once again’ recalled that workers should be able to take such action, provided the initial strike is lawful. In response to the complaint against Australia, referred to in the previous footnote, the Committee on Freedom of Association also protected an international secondary boycott, as follows: ‘The Committee recalls that the right to affiliate with international organizations of workers implies the right, for the representatives of national trade unions, to maintain contact with the international trade union organizations with which they are affiliated, to participate in the activities of these organizations and to benefit from the services and advantages which their membership offers (see Digest of 1996, para. 635). The granting of advantages resulting from international affiliation must, however, not conflict with the law, it being understood that the law should not be such as to render any such affiliation meaningless (see Digest of 1996, para. 631). The Committee, therefore, requested the Government ‘to take the necessary measures to ensure that in future trade unions are entitled

The ILO Convention No. 98 concerns the application of the principles of the right to organise and to bargain collectively. It complements the protection of the right to organize (Article 11 of Convention No. 87) by its Articles 1 and 2, in particular by protecting strikers. Article 4 of Convention No. 98, establishes the obligation of the Member States to 'encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements'. Hence, autonomous collective bargaining is not just something legitimised but also subject to encouragement and promotion by states. Taken together, the guarantee of freedom of association and the effective recognition of the right to collective bargaining at work is 'of particular significance in that it enables the persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.'²¹⁹

All EU Member States are also ILO Member States and have ratified ILO Conventions Nos. 87 and 98. The Community itself promotes and rewards compliance with them in its external relations, notably in development aid and external trade.²²⁰

4.4.3 European Human Rights Convention

A further relevant provision is in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1951, Article 11(1) of which declared:

to maintain contact with international trade union organizations, to participate in their legitimate activities and to benefit from the services and advantages of such membership' (paragraph 236). In a complaint against Canada (British Columbia) in 1988 the Committee on Freedom of Association found that a law restricting clauses on secondary boycotts in collective agreements – prohibiting trade unionists from thus giving effective assistance to their fellow workers - was not in accordance with free and voluntary collective bargaining and requested the government to review the law; report 256, case no. 1430, Official Bulletin, Vol. LXXI, 1988, Series B, No. 2, paragraph 193.

²¹⁹ Applying the terms of the fifth preambular paragraph of the 1998 ILO Declaration. Principal discussion on the role of collective bargaining is e.g. in the 2004 Global Report (under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work) of the ILO Director General, Organising for Social Justice; International Labour Conference, 92nd Session 2004, Report I (B), especially in paragraphs 27-30; <http://www.ilo.org/declaration>.

²²⁰ I here note only the trade aspect. Since 1995, the EU's Generalized System of (tariff) Preferences has acquired an additional development orientated dimension by providing special incentives rewarding compliance with international social (and environmental) standards. To qualify under the social policy incentive clause, countries must be able to provide proof of compliance with standards included in the ILO Declaration of 1998, hence i.a. with ILO Conventions Nos. 87 and 98. See Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004. It was extended to last until 31 December 2005 by Council Regulation (EC) No 2211/2003. Substantively, see Recitals 18-19 and Article 14(2) of Regulation 2501/2001.

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Article 11(2) ECHR sets up the limits for restricting the rights and freedoms guaranteed under Article 11(1). It is disputable whether the EHRC has recognized that freedom of association and joining a trade union also includes the right to collective action.²²¹ However, while the letter of the ECHR does not spell out the right to strike, although the other fundamental rights instruments referred to below do, it is appropriate to remind oneself of the need to read Article 11 ECHR in the light of Article 53 ECHR.²²² It denotes, under the heading of ‘Safeguard for existing human rights’ how ‘(n)othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party’.²²³ Hence, the ECHR does not restrict the right to strike as guaranteed by national law or other international treaties.

²²¹ See case Schmidt and Dahlström v Sweden, 1 EHRR 632 (1979), paragraph 36. On this judgment, see Novitz p. 229-30, 320-1. Advocate General Jacobs in case C-67/96 Albany [1999] ECR I-5751 (paragraph 145 of the opinion of 28.1.1999) asserted that ‘nor does Article 11 necessarily imply a right to strike, since the interests of the members can be furthered by other means’. He referred to paragraph 36 of judgment Schmidt and Dahlström v. Sweden. While it is true that paragraph 36 of Schmidt and Dahlström v. Sweden also refers to ‘other means’, it nevertheless presents – in paragraph 36 - the right to strike as one of the most important means of protecting occupational interests and required, based on the ECHR, that the members should have in national law the possibility of promoting their occupational interests by means of their organisations. On this basis the Presidium of European Convention of 2000 anchored its interpretation on Article 11 ECHR (as recognizing the right to strike) to judgment Schmidt and Dahlström v. Sweden, see Charte 4192/00 Convent 18, 27 March 2000, p. 7. This debate received a further nuance from judgment Unison v. UK in 2002 in which a Chamber of the EHRC asserted that the proposed strike must be regarded as concerning the occupational interests of the applicant’s members in the sense covered by Article 11 of the Convention; application No. 53574/99, Decision of 10 January 2002, ECHR 2002-I, available via the HUDOC portal. On this judgment and about the (only) ‘occupational’ right to strike presented there, see Novitz, p. 231-2.

²²² It is to be denoted how e.g. in case Gustafsson v. Sweden the EHRC referred (in paragraph 53) as arguments to the other international treaties, including Article 6 of the European Social Charter, Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights and Conventions nos. 87 and 98 of the International Labour Organisation. See further footnote 314, *infra*.

²²³ Novitz concludes that the EHRC has not applied Article 11 consistently with Article 53 (that she still counts as Article 60; the articles of section III of the Convention were renumbered by Protocol No. 11 (ETS No. 155)) especially by leaving aside the relevant ILO Conventions 87 and 98. See Novitz, p. 239-240.

4.4.4 European Social Charter

The European Social Charter of 1961 declares in its Article 6(4), as follows:

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

and recognize:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.²²⁴

Article H of the Charter, as revised in 1996 (Article 32 of the 1961 Charter), stipulates that ‘the provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected’.

The Appendix to Article 6(4) declares that ‘It is understood that each Contracting Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31’. However, Article 31 (Article G in the revised Charter of 1996) qualified these possible restrictions, as follows

1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

Noteworthy is that the ESC defines the scope of the right to strike/collective action being ‘cases of conflicts of interest’ and derives it, similarly to that in the ILO nowadays, from the ‘effective exercise of the right to bargain collectively’. The ESC is the only international treaty that expressly deals with the question of restrictions arising out of previous collective agreements.

²²⁴ It is worth denoting that the provision refers to obligations that *might* arise out of a previous agreement. Such obligations can be excluded. That is what the Swedish *lex Britannia* does; see section 4.9.4, and footnote 294, *infra*. The European Social Charter is inherently subject to reservations (also by its Article G). Greece has not accepted its Articles 5 and 6 whereas Austria, Luxembourg, Poland and Turkey have not accepted Article 6(4); www.coe.int. Novitz further points out that Germany, the Netherlands and Spain have excluded the application of the ESC to certain officials in the public sector, p. 132, footnote 40. On the other hand, Sulkunen (in *International Trade Union Rights*) concludes that the supervisory practice of the Charter is rather uniform with that of the ILO Conventions 87 and 98; p. 651-2 in the English summary.

4.4.5 United Nations' Covenants

The UN's International Covenant on Civil and Political Rights 1966, Article 22, recognizes freedom of association. Furthermore, the International Covenant on Economic, Social and Cultural Rights 1966, Article 8(1)(d), recognizes 'the right to strike, provided that it is exercised in conformity with the laws of the particular country'. Article 8(3) stipulates that nothing in Article 8 shall authorize state measures prejudicing ILO Convention No. 87. The EU has incorporated these covenants into its external human rights policy, even as parts of the *acquis*.²²⁵

4.4.6 Community Law and Charters

Following the case-law of the ECJ since *Stauder*²²⁶ in 1969, the Preamble of the Single European Act was the first piece of written EC law *sensu lato* that referred to fundamental rights, recognized in national law, the ECHR and the European Social Charter.

The 1989 Community Charter of Fundamental Social Rights of Workers, as a solemn declaration of the 11 Member States, stated as follows:

13. The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.

The last Recital of the Preamble to the 1989 Charter (naturally) declared its non-regressive nature as to national rights.

Article 6(1) TEU states that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. In Article F.2 (now 6(2) TEU) the Union in 1992 committed itself to respect the fundamental rights, enshrined in the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of EC law. According to Article 6(3) TEU the Union shall respect the national identities of its member States. The Treaty of Amsterdam acknowledged in Article 136 EC, first paragraph, to 'have in mind' the European Social Charter of 1961 and the Community Charter on Fundamental Social Rights of

²²⁵ See Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms; see Recital 6 in the Preamble and Article 2(1). See further Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries; see Recital 6 and Article 3.

²²⁶ Case 29/69 *Stauder* [1969] ECR 419.

Workers of 1989. Article 136 EC, second paragraph, further envisages in the social field Community measures ‘which take account of the diverse forms of national practices, in particular in the field of contractual relations’. (I have discussed Article 137(5) above, in section 4.3) Social dialogue between management and labour, contractual relations included, has been recognised in EC law since the Single European Act and is now enshrined in Article 139 EC.

With respect to this ‘normative catalogue’, the references in Article 136 of the EC Treaty to the 1989 Community Charter and the European Social Charter merit special attention because they are in the very EC Treaty. Although the referential ‘bridge’ is only the expression ‘having [these Charters] in mind’, it still makes both of these Charters part of EC law. A bottom line interpretation is that the reference to the European Social Charter by this ‘having in mind’ does not and cannot nullify its nature as an international treaty that binds within the limits that I have referred to in footnote 224, *supra*. Therefore, if one takes the Treaty references seriously (in terms of Birk; see footnote 202, *supra*), it means that one must conclude that the right to strike/industrial action has in principle a binding guarantee in EC law. This conclusion obviously also has more practical consequences in the justification of the Swedish *lex Britannia*; see footnote 294, *infra*.

Furthermore, the Charter of Fundamental Rights of the European Union of 2000 (the EU Charter)²²⁷ as a solemn declaration of the Council, Parliament and Commission declared in its Article 28 that

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

The explanations prepared under the responsibility of the Praesidium of the Convention preparing the Charter noted that this Article was based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The explanations further denoted how the collective action was recognized by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. Moreover, according to the explanations, collective action, including strike action, comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.²²⁸ Still in the text of the Charter is also the explicit

²²⁷ On the Charter in general, see e.g. Koen Lenaerts and Eddy De Smijter, A ‘Bill of Rights’ for the European Union, 38 Common Market Law Review (2001), 273-300.

²²⁸ A footnote attached to the published Charter denotes how the explanations ‘have no legal value and are simply intended to clarify the provisions of the Charter.’ However, Article II-112(7) of the Constitutional Treaty states that ‘The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.’ This ‘provision of guidance’ and ‘due regard’ however cannot overthrow the unambiguous level of protection clause in Article 53 of the Charter (II-113 of the Constitutional Treaty). Besides, next to Article 53, the Preamble to the Charter also reaffirms the international obligations common to the Member States. Hence, the reference to ‘the modalities and limits for the exercise of collective action’ in the explanations to Article 28 of the Charter by the Praesidium of the Convention on the Future for Europe cannot be validly interpreted as meaning that the Member States would

reference to a fundamental right to collective action to defend their interests, including strike action, ‘in accordance with Community law’.

Article 52(3), second sentence, of the Charter declares the possibility of a protection by Community law stricter than that guaranteed by the ECHR. Furthermore, according to Article 53 (Article II-113 of the Constitutional Treaty), nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised i.a. by international agreements to which all the Member States are party. The ILO Constitution and Conventions Nos. 87 and 98 are such agreements.

Several Advocate Generals have referred to the EU Charter in support of an argument²²⁹ as well as the Court of First Instance in many cases.²³⁰ The Court of Justice has obviously not yet been compelled to make such a reference and may, on the other hand, so far feel more comfortable in refraining from such a reference while the Charter is still to become formally binding through the entry into force of the Constitutional Treaty (in this case Article II-88). However, the EU Charter represents a kind of a resumé of the fundamental rights developments within the E(E)C and EU. Lenaerts and de Smijter conclude that it is also an emanation of the common constitutional traditions, in the substantive sense of the term ‘constitutional traditions’. They therefore argue that it is a part of the *acquis communautaire*, even if it is not yet a part of the Treaties.²³¹

The European Commission, upon the request of the European Parliament, has set up an EU Network of Independent Experts on Fundamental Rights. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. In its ‘Synthesis Report: Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and Its Member States in 2004’ of 15 April 2005 it qualified the

have a free hand in restricting the right to collective action via these modalities and limits for exercise.

²²⁹ The first reference obviously was in the Opinion of Advocate General Alber (1.2.2001) in case C-340/99 *TNT Traco* [2001] ECR I-4019, paragraph 94.

²³⁰ See e.g. judgment in case T-54/99 *max.mobil Telecommunications* [2002] ECR II-313, paragraphs 47 and 57.

²³¹ Lenaerts and De Smijter, footnote 227, *supra*, p. 299. As grounds they refer to the holistic interpretation given by the Court to the term ‘common constitutional tradition’, the composition and functioning of the Convention drafting the Charter as well as to the unanimous acceptance of the text by the three EU institutions with legislative powers. As a reflection of the holistic interpretation they refer to case 44/79 *Hauer* [1979] ECR 3727, paragraphs 20 to 22, and note how the Court does not undertake an exhaustive study of the constitutional provisions of *all* the Member States. They further refer to the Opinion of AG Tizzano of 8 Feb. 2001 in case C-173/99 *BECTU* [2001] ECR I-4881 where (paragraph 28) he asserted that ‘the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right’. The Court passed the EU Charter but relied expressly (in paragraph 39) on the 1989 Charter that is referred to by the Preamble to the Working Time Directive. - The refusal by a number of Member States to insert the EU Charter into the Treaties already in 2000 is seen by Lenaerts and De Smijter as more a political than a legal issue.

Charter, as follows: ‘However, the Charter also constitutes a catalogue of common values of the Member States of the Union. In that respect, the Charter may be taken into account in the understanding of Article 6(1) EU, to which Article 7 EU refers. [...] the Network considers the Charter as the most authoritative embodiment of these common values, on which its evaluation therefore may be based.’²³² This statement shows that it is appropriate to consider and assess the right to strike in the light of the very founding principles of the Union, as enshrined in Article 6(1) TEU: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. A further necessary conclusion is also that the restrictions on the right to strike must qualify under the parameters enshrined in Article 6(1) TEU, as strictly elaborated by the Court of Justice in judgment *Schmidberger*, paragraphs 79 and 80 (see section 4.10.1, *infra*).

The normative complex in EC law is completed by the so-called Monti-Regulation (2679/98/EC).²³³ According to its declaratory Article 2

‘This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.’

It is natural to reason that this principle of Article 2 in the Monti-Regulation also applies within the field of the free provision of services, although in assessing restrictions on the free movement of goods and services the test patterns are not entirely parallel.²³⁴ However, a natural connecting factor is the fact that goods move by means of transport services or stop moving following a strike in that service sector.

4.4.7 Member States’ Constitutions

As to the common constitutional tradition of the Member States regarding the right to strike, it suffices for the purposes of this reasoning to denote that among the old Member States in Greece, Italy, Portugal, Spain and Sweden the right to strike is enshrined in the constitution; in Belgium, Denmark, France and Germany it is

²³² The report is available via http://europa.eu.int/comm/justice_home/index_en.htm or with reference ‘CFR-CDF.Conclusions.2004.en’. The Network also took into account the fact that there are provisions of the Charter other than Article 52(3) that ‘have to be read in accordance with the rights guaranteed in instruments adopted in the field of human rights in the framework of the United Nations, the International Labour Organisation or the Council of Europe’; p. 10 of the Report. This is fully in line with what I assert on the applicability of the ‘ILO right to strike’ even by the EU; see sections 4.5 to 4.7, *infra*.

²³³ Officially it is Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States.

²³⁴ I recall how e.g. in *Bosman* (footnote 190, *supra*) the Court relied on case-law on the free provision of services. The difference is, of course, that in the free provision of services the Court has not accepted the *Keck and Mithouard* (Cases C-267 and 268/91 [1993] ECR I-6097) formula, according to which – in a nutshell – equal selling arrangements are not regarded as forbidden restrictions to the free movement of goods. In services the Court applies the *Arblade*-test.

proclaimed there as a freedom. In Austria and Finland the right derives from the constitution. In the new Member States the right to collective action is enshrined in the constitution with the exceptions of the Czech Republic and Malta. One may therefore justly conclude that the common constitutional tradition is sufficient so as to be relevant in the sense of the fundamental rights formula of *Omega Spielhallen*, paragraph 33.

4.4.8 Summing up; Comparing International Treaties

In summing up I recall that the ECHR (via its jurisprudence), the ILO Conventions Nos. 87 and 98 (via the supervisory practice and as anchored in the ILO Constitution), the UN Covenant and the three Charters (expressis verbis) – two of them besides issued within the Community - do recognize the right to strike as a fundamental right, complemented by the Monti-Regulation in secondary EC law. Hence, the national constitutional tradition together with the international treaties justifies concluding that the right to strike is a fundamental right in EC law.

Within these international instruments, the protection of the right to strike is obviously the broadest and strongest under the ILO Conventions No. 87 and 98, as anchored in the ILO Constitution.²³⁵ It is notable that the EU Charter of 2000 comes close to them at least in the sense that it recognizes the right to strike for organizations, too, more particularly ‘in cases of conflict of interests’. Even that formula anyway fully covers cases like that in *Laval*.

To illustrate the difference between the approach (and interpretation) of the ECHR and that of the ILO, I would mention the freedom of association. I would further point out that for analytical purposes it is common to make, in describing the basic trade union rights, a distinction between three facets: the right to organise (or, freedom of association), the right to collective action and the right to collective bargaining.²³⁶ In the judicial practice under Article 11 of the ECHR this distinction has generated some discussion as to whether the right to strike can be derived from the freedom of association.²³⁷ Obviously, that discussion still continues. In the ILO practice, hence under Convention No. 87, both the right to strike and the right to collective bargaining have been unequivocally derived from the freedom of association.^{238 239} Furthermore,

²³⁵ On this, concerning particularly the permissible objectives of a strike, see Novitz pp. 285-294 (also with more references to ILO practice on sympathy actions, pp. 290-292), and as a summary and on theoretical, structural and contextual differences, pp. 329-339.

²³⁶ This is what e.g. AG Jacobs did in case C-67/96 Albany (footnote 221, *supra*); see paragraph 134 of the Opinion of 28 January 1999.

²³⁷ See footnote 221, *supra*, concerning the debate as to case Schmidt and Dahlström v. Sweden and especially the position of AG Jacobs thereon.

²³⁸ As to the right to strike, see e.g. footnote 213, *supra*. As to the right to collective bargaining, the 1996 Digest (footnote 214, *supra*), referring to the travaux préparatoires of Convention No. 87, characterized it, as follows: ‘The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to

and illustratively, in the 1998 Declaration on Fundamental Principles and Rights at Work the ILO defines as core labour rights: the freedom of association and the effective recognition of the right to collective bargaining. The report, drawn up under the responsibility of the ILO Director-General, following up the 1998 Declaration, sets forth that ‘the right to strike is the logical corollary of the effective realization of the right to collective bargaining. If it does not exist, then bargaining risks being inconsequential – a dead letter.’²⁴⁰ This way the 1998 Declaration is the modern – and additional – source of the universal right to strike, expressly anchored in the ILO Constitution. But coming back to the question about arguably different contents of freedom of association within the ILO and the EHRC, crucial is to see that the ILO practice is by no means imprisoned by any constraints in the analytical distinction in three facets. On the other hand, there is nothing in the 1998 Declaration showing any aim to restrict or dilute the value of the earlier positions in the supervisory practice by this certain shift of emphasis, i.e. definition of the right to collective bargaining, too, as the source of the right to strike. Defending economic and social interests remains as its scope. This shift of emphasis reflects more adequately the common ground that justified strikes have a justified goal, i.e. normally an agreement with the employer side. - Finally, noteworthy is also that the EU Charter presents the right to strike as an extension (or, guarantee) of the right to collective bargaining.

However, the special status granted in the fundamental rights doctrine to the ECHR (*Omega Spielhallen*, paragraph 33) would lead one to conclude that the ECJ would find it possible to decide the lot of the right to strike in EC law, as well as the *Laval* (Vaxholm) case, by using the ‘occupational’ right to strike, recognized i.a. in *Unison v. UK* by the EHRC. In this sense it is to be noted that already Articles 53 of the ECHR and the EU Charter directly lead to the application of the fundamental rights doctrine in drawing even exclusive inspiration from the ILO right to strike, taking into account that the ILO Constitution and Conventions Nos. 87 and 98 bind every EC Member State. Another issue is that a strong requirement of coherence – and, in fact, a moral argument – militates for the same result: what the EU promotes and rewards in its external relations as a part of the *acquis communautaire* (i.e. application of ILO Conventions – i.a. - Nos. 87 and 98 in the Generalized System of Preferences), it must also respect internally.

Still, the special status of the ECHR in the fundamental rights doctrine, together with the certain margin of discretion inherent in ‘drawing inspiration’ from international treaties, leads to a discussion of two additional legal sources in this context: the effect of Article 307 EC and *general international law*.

infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes’; Digest, paragraph 782. See that e.g. AG Jacobs in *Albany* (footnote 221, *supra*) at this point, concerning the right to collective bargaining, refers only to (the wording in Article 4 of) Convention No. 98; he concluded that ‘no right is granted’; paragraph 147 of the opinion of 28.1.1999.

²³⁹ Sulkunen states that the right to collective bargaining has been derived from Convention No. 98 as well; Sulkunen, *Kansainväliset ammattiyhdistysoikeudet* (International Trade Union Rights), p. 647 (in the English summary).

²⁴⁰ ILO, *Your Voice at Work* (2000), paragraph 101; www.ilo.org.

4.5 Article 307 EC

Article 307 EC, first paragraph, stipulates that ‘(t)he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.’ Article 307 EC is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty.²⁴¹ Furthermore, the purpose of Article 307, first paragraph, is defined ‘in accordance with the principles of international law’, i.e. the 1969 Vienna Convention on the Law of Treaties.^{242 243} Furthermore, crucial in an ILO context, the leitmotiv for

²⁴¹ Case 812/79 Attorney General v Burgoa [1980] ECR 2787, paragraph 6, and Case C-158/91 Levy [1993] ECR I-4287, paragraph 11. On Levy Macleod, Hendry and Hyett, *The External Relations of the European Communities*, Clarendon Press Oxford 1996, p. 230, have written laconically that the duty of the Community to respect pre-existing agreements of the Member States ‘extends to permitting the Member State to fulfil its obligations, if necessary by allowing it to maintain in place legislation which would otherwise be contrary to its Community obligations’. Piet Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford University Press, 2004, p. 338-9, denotes a contrast between the outcome in Levy and the opinion of Lenz AG in joined cases 209 to 213/84 *Ministère public v. Asjes* [1986] ECR 1425, 1453. The latter conditioned the effect of Article 307 EC, first paragraph, by compliance with the second paragraph. Eeckhout’s conclusion is that deviating from judgment Levy (or from the opinion of Tesouro AG in Levy) would mean to let the EC law impose a breach of international law.

²⁴² See e.g. Case C-84/98 *Commission v. Portugal* [2000] ECR 5215, paragraph 53. The Vienna Convention is available e.g. via <http://www.un.org/law/ilc/texts/treaties.htm>.

²⁴³ The ECJ has applied the Vienna Convention, next to case Levy (see footnote 241), paragraphs 19 and 20, e.g. in its Opinion 1/91 *European Economic Area* [1991] ECR I-6079, paragraph 14 (interpretation of an international treaty in accordance with Article 31 of the Vienna Convention) and in cases Case C-312/91 *Metalsa Srl*. [1993] ECR I-3751, paragraph 12 (Article 31 of the Vienna Convention); C-432/92 *Anastasiou* [1994] ECR I-3116, paragraph 43 (on the rules on the interpretation of treaties; see Article 31 of the Vienna Convention); C-162/96 *Racke* [1998] ECR I-3655 paragraphs 18 et al., especially 58 and 59 (on *rebus sic stantibus* clause); and C-416/96 *Nour Eddine El-Yassini v Secretary of State for Home Department* [1999] ECR I-1209, paragraph 47 (interpretation rules on international agreements, Article 31 of the Vienna Convention; it seems that the ECJ resorted to the Vienna Convention by its own motion); the CFI did it in case T-115/94 *Opel Austria* [1997] ECR II-39, paragraph 90 and 91 (principle of good faith as a rule of customary international law; Article 18 of the Vienna Convention). In case C-286/90 *Poulsen* [1992] ECR I-6048, paragraph 9, the ECJ not only referred explicitly to rules of international law but also accepted their binding nature (on this case, see further section 4.6, *infra*, in the context of case Racke).

On this case-law, e.g. see Christiaan Timmermans, *The EU and Public International Law*, 4 *European Foreign Affairs Review* (1999), pp. 185-188; Koen Lenaerts & Eddy De Smijter, *The European Union as an Actor under International Law*, 19 *Yearbook of European Law* (1999-2000), pp. 95-138, at 115-126. For the purposes of this reasoning it suffices to note the title of Timmermans in explaining the case-law of 1990s: ‘A More Open Attitude of the Court *vis-à-vis* International Law’. Piet Eeckhout (footnote 241, *supra*, p. 343) reminds one of the simple but important source of developments. Namely, distinguishing EC law clearly from international law and restricting the latter’s effects once was rather natural for a new legal order. However, ‘it seemed incongruous for a legal order which owed its very birth and existence to international law to become unresponsive to the latter’. He further reminds how this receptive attitude towards international law has an important political dimension. The EU

the application of Article 307 EC is no longer limited to guaranteeing the rights of *third countries*.²⁴⁴ This became clear in judgment *Levy*²⁴⁵ where the full Court resorted to the obligations of the Member States as the leitmotiv. In so doing it also recognised the binding nature – in EC law - of the ILO Convention No. 89 prohibiting night work for women. France was allowed to apply penal sanctions against an employer who breached the Convention while he invoked compliance with the Directive 76/207/EEC on equal treatment. Furthermore, *Levy* extended the application of prevailing prior international agreements to the benefit of individuals.²⁴⁶

It is essential to note that under Article 307 EC the ILO Constitution qualifies with respect to every EU Member State as an earlier international agreement. This implies that the freedom of association and the effective recognition of the right to collective bargaining have in EC law, too, their effect as principles embodied in or, respectively, annexed to the ILO Constitution.

It is essential further to determine whether the ILO Conventions Nos. 87 and 98 also qualify as earlier international treaties. Among the six founding states of the EEC Belgium, France, Germany and the Netherlands ratified the ILO Convention No. 87 prior to the entry into force (1 January 1958) of the Treaty of Rome while Luxembourg did it on 3 March 1958 and Italy on 13 May 1958. Accordingly, Luxembourg and Italy ratified Convention No. 98 on the same dates while the Netherlands did it just on 22 December 1993. All the succeeding Member States have joined the Community after having ratified them. This also concerns the newest Member States that joined on 1 May 2004. In any case, a literal reading of Article 307 EC leads to the conclusion that ILO Conventions Nos. 87 and 98 have remained in force as earlier agreements with the abovementioned exceptions. Such a legal split would lead to undesirable or unacceptable imbalances between the Member States. However, between e.g. Latvia (home state of Laval un Partneri Ltd, the plaintiff in the *Laval* case) and Sweden there would not be any imbalance.

is deeply involved in international relations where it is also faced with the hegemonic approach of the United States. He finally recalls the Constitutional Treaty that (in Article I-3) provides that the EU 'shall contribute...to strict observance and development of international law, including respect for the principles of the United Nations Charter'. - The latest example of the application of the Vienna Convention (by 3 June 2005) by the ECJ obviously is case C-347/03, *ERSA*, judgment of 12 May 2005, nyr.

As to other examples of the overall value of international law in interpreting the basic concepts of the EU's legal order, see joined cases C-46/93 and 48/93 *Brasserie de Pêcheur and Factortame*, [1996] ECR I-1029, paragraph 34; and case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 32; both judgments concerned state liability under EC law.

²⁴⁴ Like e.g. in cases 10/61 *Commission v. Italy* [1962] ECR 1, 812/79 *Burgoa* [1980] ECR 2787, paragraph 8, and 121/85 *Conegate* [1986] 1007, paragraph 25.

²⁴⁵ Case *Levy* (footnote 241, *supra*), paragraph 22.

²⁴⁶ This is also the conclusion of Lenarts and De Smijter, footnote 243, *supra*, p. 119. Based on judgment *Levy*, Krüger, Nielsen and Bruun have referred to Article 307 (ex 234) in the contradiction between Article 3(2) (eight days' installation works), 3(3) and 3(4) PWD, and Labour Clauses (Public Contracts) Convention (No. 94) 1949 of the ILO; Kai Krüger, Ruth Nielsen & Niklas Bruun, *European Public Contracts in a Labour Law Perspective*, DJØF Publishing, Copenhagen 1997, p. 232. However, while Sweden has not ratified this Convention and it does not deal directly with the right to strike, I do not explore it further.

Hence, the finding above is the ‘delayed’ – in the case of Article 307 EC - ratification of ILO Convention No. 87 by Luxembourg and Italy, as well as that of ILO Convention No. 98 by Luxembourg, Italy and the Netherlands. While this, taken literally, means with respect to these Conventions the non-applicability of Article 307 EC in trade involving these Member States, there is still one relevant legal source that presumably leads to adoption of the ILO right to strike as a coherent EC standard, namely general international law.

4.6 General International Law

The EU as a subject of international law is bound by general (customary) international law.²⁴⁷ In *Racke* (see footnote 243, *supra*) the Court expressed this, as follows:

‘45. It should be noted in that respect that, as is demonstrated by the Court's judgment in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.’

The rules of customary international law in this case mean those codified in the Vienna Convention. On the other hand, there is no real reason why this respect for international law should not cover cases where the Community is not a formal party to an international treaty but only the Member States, as in the case of the ILO provisions. In that sense I recall the fact that the ILO Constitution and Conventions Nos. 87 and 98 bind every Member State. Furthermore, Article 26 of the Vienna Convention stipulates, under the heading *Pacta sunt servanda*, that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

²⁴⁸ Therefore, it is impossible, indeed, to avoid the conclusion that the Member States have a mutual commitment to respect the ILO Constitution and Conventions Nos. 87 and 98, too, in trade between them by virtue of customary international law (as codified in the Vienna Convention).

²⁴⁷ As to EU and general international law, see e.g. Timmermans, footnote 243, *supra*, pp. 181-194 (also including a heading ‘Community Law as a Factor of Strengthening International Law’); Lenaerts and De Smijter, footnote 243, *supra*, pp. 95-138, especially at pp. 122-126 (under the heading ‘The Status of Customary International Law in the European Legal Order’).

²⁴⁸ In *Racke* (footnote 243, *supra*) the Court highlighted the value of the *pacta sunt servanda* principle and stated, as follows: ‘49. The rules invoked by Racke form an exception to the *pacta sunt servanda* principle, which constitutes a fundamental principle of any legal order and, in particular, the international legal order. Applied to international law, that principle requires that every treaty be binding upon the parties to it and be performed by them in good faith (see Article 26 of the Vienna Convention).’ The Court further relied (paragraph 50 of *Racke*) on the qualification by the International Court of Justice, which has held that ‘the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases (judgment of 25 September 1997, *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, at paragraph 104...).’ The judgment is available on the website <<http://www.icj-cij.org/>>.

The theoretical possibility that the Member States would have certain rules for themselves as ILO Member States and different rules for themselves within the EU surmounts the limits of any genuine legal reasoning. This is *a fortiori* the case whereas, as noted above, the EU in its external policy promotes and rewards as a part of the *acquis* compliance with these ILO Conventions. In the light of the effect of Article 307 EC and general international law one might ask why it was necessary to present the overall contents of the three Charters and the UN Covenant. It was appropriate, first, simply to describe the legal landscape, and, second, also to show that this contains more than just the position of AG Jacobs in Albany (explained below under EC case-law) and the ILO provisions as alternative legal sources. Third, it was necessary to show that the application of the ILO provisions, or the adoption of the right to strike according to them as the EU's basic standard, is finally not just an inevitable outcome but also in harmony with the other international treaties.

There is one principal aspect to be added concerning the relationship between Community law and the obligations of the Member States under international treaties. Namely, as the Court stated in its *AETR* judgment,²⁴⁹ where Community rules have been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations that might affect those rules or alter their scope. There are no substantive Community rules *sensu stricto*²⁵⁰ on strike (but only Article 2 of the so-called Monti-Regulation 2679/98). Hence, concerning the right to strike, there cannot be any substantive contradiction between the Member States obligations under the ILO provisions and those under Community law. On the other hand, e.g. the Court's Opinion 2/91 concerning the ILO's Chemicals Convention 1990 shows that the ECJ takes seriously the obligations of the Member States under the ILO Conventions; see e.g. paragraphs 23 and 26 of the Opinion where the Court found that the Member States could not assume certain ILO obligations adversely affecting i.a. protection of workers in the field of chemicals.²⁵¹

4.7 Intermediate Concluding Remarks

The result of this international discourse shows the necessity of considering the application – obviously for the first time - of Article 307 EC to a situation where the relevant international treaties (the ILO Constitution and the Conventions 87 and 98) are ratified by and bind every Member State. A literal reading of Article 307 EC first

²⁴⁹ Case 22/70 Commission v Council [1971] ECR 263, paragraph 22.

²⁵⁰ The European Social Charter and the 1989 Community Charter are referred to in Article 136 EC as something to be had in mind. As to a contradiction between EU and ILO norms, also see case C-203/03, Commission v Austria, judgment of 1.2.2005, nyr. It dealt with an ILO based national (basic) prohibition of female work in mines. Austria invoked Article 307 EC, linked to ILO Convention No. 45 of 1935. The ECJ (Grand Chamber) a priori, let it be that with certain conditions, accepted the defence (paragraphs 57 to 64). However, an elementary difference from case Laval (right to strike) is that in Commission v Austria the EC law applicable included clear substantive provisions in Directive 76/207 on gender equality as regards access to employment, vocational training and promotion, and working conditions.

²⁵¹ Opinion 2/91 Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work [1993] ECR I-1061.

leads one to conclude *ipso jure* that freedom of association (as embodied in the ILO Constitution) and the effective recognition of the right to collective bargaining (as annexed to the ILO Constitution) have also remained in force in EC law. Accordingly, ILO Convention No. 87 has remained in force as an earlier agreement with the exception of Luxembourg and Italy. ILO Convention No. 98 is also an earlier agreement, with the exception of Luxembourg, Italy and the Netherlands. General international law anyway leads to the application of these Conventions ('the ILO right to strike'), also including in the case of the exceptions, and, thus, as the coherent EU standard, without the possibility of resorting to the standard drawing of inspiration (only) from international treaties. This finally also excludes any (diluting) influence of the other international treaties or charters - which is not, I would remind the reader, against the expressed purpose and spirit of each of them - as well as any difficulty in the national constitutional tradition. This outcome essentially also means the recognition of the right to strike as a right of the organisations to defend their economic and social interests, covering the right to sympathy (solidarity) action. If the wording of the EU Charter is used to define the EU right to strike, the contents must anyway fulfil the ILO criteria.

A terminological remark is that in the following I take the ILO right to strike/industrial action as applicable – by virtue of Article 307 EC and general international law - within the *fundamental rights doctrine* (*Omega Spielhallen*, paragraph 33). Discussing e.g. the convergence of that doctrine with the principles of justifying restrictions on the free provision of services then implies this connotation. This is my way of retaining the protection aspect in the fundamental rights doctrine without having to repeat it all the time.

Still, any *detailed* substantive definition of the right to strike/industrial action at a Community level (let alone at the international level) has not yet been feasible nor will it be feasible in the foreseeable future, given the existing diversity in national strike laws and practices. However, the basic recognition of the right to strike/industrial action in its ILO form is a commitment of all the Member States, and one which the Community respects. A direct consequence thereof must be that interpretations of Community law (here Articles 49 and 50 EC) cannot generally overrule or preempt the right to strike, as further elaborated in national regulations. This is my preliminary conclusion. It has legal support in Article 136 EC where the EU Member States have drawn into the sphere of the *acquis* the fundamental social rights enshrined in the European Social Charter and in the 1989 Community Charter of the Fundamental Social Rights of Workers. Furthermore, Article 28 of the Charter of Fundamental Rights of the European Union is a politico-constitutional enshrinement of the right to strike/industrial action, which can be read together with the ILO right to strike and can be interpreted ultimately in harmony with the founding principles of the Union: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law (Article 6(1) TEU).

It is finally noteworthy that even the Commission has stated that 'with regard [...] to international core labour standards, the fundamental principles and rights at work identified by the International Labour Organization of course apply in their entirety to

the countries of the EU'.²⁵² Self-evidently, the right to strike is one of the rights meant in that statement.

4.7.1 ILO Supervision v. EU Proceedings

The above conclusion, that the ILO right to strike is also binding on the EU, naturally raises the question about the relationship between the interpretations and application of the ILO's constitution and conventions within the ILO and those to be adopted by the ECJ. A preliminary remark is that the two international organisations (the ILO and the EU) have been close for quite some time. Their cooperation dates back to 1958 and is now based on the exchange of letters between the EU Commissioner for Employment and Social Affairs, Anna Diamantopoulou, and the ILO Director-General, Juan Somavia, in 2001.²⁵³ The cooperation is reinforced by the EU promoting and rewarding compliance of the core ILO Conventions (Conventions 87 and 98 included; see section 4.4.2, especially footnote 220, *supra*), covered by the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

The ILO standards have often served as a model for E(E)C law, even such as Article 141 (ex 119) EC on equal remuneration which has its international legal roots in the ILO's Equal Remuneration Convention, 1951 (No. 100).²⁵⁴ A further example is the

²⁵² See the Commission Communication, Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM(2001) 416 final, p. 11.

²⁵³ The exchange of letters is available at: http://europa.eu.int/comm/employment_social/news/2001/jun/letter1_en.html and http://europa.eu.int/comm/employment_social/news/2001/jun/letter2_en.html. In the latter Mr. Somavia stated, as follows: 'Against this background, the Commission and the ILO agree that it would be of benefit to both organisations to develop their co-operation by focussing [inter alia] on the following priority areas: The promotion of labour standards, notably with regard to the principles and rights set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work;'.

²⁵⁴ Arrigo and Casale denote that Article 141 (ex 119) EC was 'clearly inspired' by this ILO Convention; see Gianni Arrigo and Giuseppe Casale, Glossary of labour law and industrial relations (with special reference to the European Union). International Labour Office, Geneva, 2005, p. 23. *Idem* Novitz 2005, footnote 202 *supra*, p. 221. The ECJ referred to this ILO Convention in case 43/75 Defrenne II [1976] 455, paragraph 20. Besides, e.g. in the Preamble to the Working Time Directive 93/104/EC, Recital (4) (Recital (6) in codifying Directive 03/88/EC), the Community legislator has referred to corresponding ILO principles. As an expression of the confidence that the ILO has enjoyed in the eyes of the Commission one may mention the draft parallel Community ship register; see Commission Communications COM(89) 266 final and COM(91) 483 final. Namely, the Commission proposed that wages, working hours and further labour conditions of seafarers, who were not nationals of a Member State, on board vessels registered in that EC register (EUROS) 'shall be in accordance with the ILO Wages, Hours of Work and Manning (Sea) Recommendation (No 109)'; see Article 8 of the first Communication and Article 14 of the second. Deviations by collective agreements were possible; see Articles 9 and 15, respectively. Thus, the Commission wanted to raise the ILO Recommendation into a position of a principal norm in the EC legal order. The Commission did not see it as being necessary to justify this legal

Posted Workers Directive that was also inspired by the Labour Clauses (Public Contracts) Convention, 1949 (No. 94). Still, a discussion about the two distinct supervisory and jurisdictional structures seems rather self-evident. However, time and space do not allow any in depth discussion of this topic here.

Thus, the supervisory machinery in the ILO, concerning Convention Nos. 87 and 98, includes the Committee of Experts (which gives a yearly report to the International Labour Conference) and the Committee on Freedom of Association that works under the Governing Body of the ILO and deals with individual complaints. At the top of the interpretation of the ILO Constitution or its single conventions is the International Court of Justice; see Articles 29, 31 to 34 and 37 of the ILO Constitution. Under the last mentioned article the ILO Governing Body may also appoint an ad hoc tribunal. Since its creation in 1951 the Committee on Freedom of Association has examined over 1800 cases. On the other hand, the ICJ practice seems to include no substantive case concerning the ILO Constitution or Conventions. Therefore, a contradiction between the ECJ and the ICJ is rather theoretical. On the other hand, the ECJ has sometimes resorted to the authority of the ICJ as e.g. judgment *Racke* shows.²⁵⁵

The question of possibly overlapping and even contradictory supervisory and court practice is still worth some further principal remarks. In so doing I will mainly set aside for the present the status of the Commission in supervising the functioning of the Internal Market.

A source of certain tension is the fact that the EU is not - and cannot be, due to Article 1(2) of the ILO Constitution - a member of the ILO. It is a member e.g., and in particular, in the World Trade Organisation (WTO) that has its own dispute settlement and court system. In the ILO the EU has an observer's status while officially it is represented by the EU Member States. But viewed the other way round, my crucial thesis is that the ILO right to strike/industrial action 'penetrates' the EU's legal order even *de jure* (under Article 307 EC) and ultimately by virtue of general international law.

However, there are several factors which alleviate a potential problem concerning overlapping supervision and/or jurisdiction. The first factor is that the supervisory practice of the ILO, while it deals with concrete cases, does not require any EC-modelled balance to be struck at a detailed level between work rights and the economic market freedoms. Wide and detailed case-law of the ECJ does cover these freedoms. In that sense, my further crucial thesis is that recognising the binding effect

structure (see paragraph 61 of the 1989 Communication) but found that 'legally speaking the setting up of a parallel register is not a major problem' (ibid., paragraph 65).

²⁵⁵ For *Racke*, see footnote 248, *supra*. As to an ICJ reference by the ECJ within employment law, I refer as an example to judgment in case C-37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, paragraphs 34 to 36. The case concerned a contract of employment, more precisely the definition of the place where the employee habitually carried out his work. The work was performed partly at an installation positioned over the continental shelf adjacent to a Contracting State (to the Brussels Convention on jurisdiction) and partly in the territory of another Contracting State. One can imagine 'inserting' a total strike, or even a sympathy action into such a legal framework. However, the ILO right to strike would clearly streamline it. I will take the liberty to postpone any in depth discussion thereof.

of the ILO right to strike within the EU does not deprive the ECJ of its status as a guardian of the Treaty in general, let alone its rules on the Internal Market. A further alleviating factor is that in Articles 227 and 292 EC ²⁵⁶ the EU Member States have committed themselves not to bring their ‘internal’ EC law disputes, i.e. in this context those regarding the interpretation of EC law, before the courts outside the Union, and thus elsewhere than the ECJ. Hence, the EU Member States are also committed to leave any dispute involving a balance-striking between the right to strike/industrial action and the fundamental market freedoms (i.e. any such interpretation of the EC Treaty) for the ECJ to decide; its decision meaning here a principal line drawing while the ECJ ‘internally’ may leave e.g. a concrete application of the proportionality principle for a national court to decide. I will comment the status of national courts in the end of this section.

Coming back to the issue of possibly conflicting judicial supervision, it is useful to remember the Opinion 1/00 ²⁵⁷ of the ECJ concerning judicial supervision within the then draft European Common Aviation Area (ECAA). There the ECJ first reasoned, as follows:

20. The Court has already recognised that an international agreement entered into by the Community with non-Member States may affect the powers of the Community institutions, without, however, being regarded as incompatible with the Treaty. As it found in its Opinions on the draft agreements relating to the creation of the EEA, such an agreement is regarded as *compatible with the Treaty provided it does not alter the essential character of the powers conferred on the Community institutions by the Treaty* (see, in particular, Opinion 1/92, paragraphs 32 and 41). (italics added)

The ECJ continued (in paragraph 23) by noting that the ‘indispensable conditions for safeguarding the essential character’ of its own powers were satisfied. It presented as grounds, first (in paragraph 24), the fact that the Court remained responsible for ruling on all questions ‘concerning the legality of decisions taken by Community institutions under this Agreement.’ Consequently, the Court’s powers under inter alia Articles 230 EC and 234 EC were not called in question. The ECJ’s second ground highlighted (in paragraph 25) how the proposed ECAA Agreement safeguarded the binding effect of the preliminary rulings of the ECJ.

The ECAA Agreement also included a dispute settlement procedure that is indirectly relevant in the ILO context. The background was that the ECAA Agreement replicated a whole number of Community rules such as those relating to market access, freedom of establishment, equal conditions of competition, safety and environment. The agreement also established a Joint Committee to resolve disputes and to ensure

²⁵⁶ Article 227 EC, first subparagraph, reads, as follows: ‘A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.’ Article 292 EC for its part stipulates that the ‘Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.’

²⁵⁷ See Opinion pursuant to Article 300(6) EC: Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area; Opinion 1/00 [2002] ECR I-3493. For this opinion, see the case annotation of Fernando Castillo de la Torre, CMLRev. 39: 1373-1393, 2002.

the uniform implementation of the provisions concerned. This created a potential threat to the autonomy of the Community legal order, which the Court addressed separately (paragraphs 27 to 45). The solution to this threat was that the dispute resolution and interpretation mechanisms ultimately did not bind the Community and its institutions (notably the Commission) to a particular interpretation of EC law. In the ILO context it is essential to note that the ILO right to strike/industrial action does not replicate any Community rules and, therefore, a similar threat to the autonomy of the Community's legal order should normally not arise.

A comparison of the grounds expressed by the ECJ in their Opinion 1/00 suggests that the same outcome would also be reached in the context of the ILO right to strike/industrial action: while it binds within the EU, it does not alter the essential character of the powers of the ECJ. *Mutatis mutandis* this also applies to the Commission.

The status of national courts still requires some important comments. As mentioned, it is natural that what binds the EU and the ECJ, also binds the national courts when interpreting EC law. The obligation of the Member States to respect the fundamental rights – when they are implementing EU law - is also enshrined in Article 51(1) of the Charter of Fundamental Rights of the European Union. In *Booker Aquaculture Ltd* the ECJ confirmed as settled case-law ‘...that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements’.²⁵⁸ Some elementary additional remarks will suffice here to amplify the point. Thus, according to the *Simmenthal*-doctrine a national court is under a duty to set aside the national rules not only when they conflict with express Community rules but also if they are ‘otherwise incompatible with the provisions of Community law’.²⁵⁹ On the other hand, there is also the question to what extent the ILO right to strike/industrial action, via the EU, ‘penetrates’ purely national situations (and strike rules). I take the liberty to pass over this issue here. However, within the ambit of EC law, as for example in the cross-border provision of services, a consistent treatment of the fundamental rights requires that the national courts protect those rights to the same extent as the ECJ does. Primacy and the uniform application of EC law are also strong grounds in support of this conclusion. Hence, what binds the Member States, also binds their courts.²⁶⁰ The logical conclusion is that the national courts also must

²⁵⁸ See joined cases *Booker Aquaculture Ltd*, trading as *Marine Harvest McConnell* (C-20/00), *Hydro Seafood GSP Ltd* (C-64/00) v *The Scottish Ministers* [2003] ECR I-7411, paragraph 88.

²⁵⁹ See case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, paragraphs 18 to 24.

²⁶⁰ The fact that the rules regarding the EU right to strike/industrial action derive essentially from an outside source, i.e. the ILO, does not alter the criteria applicable when a national court considers a request for a preliminary ruling of the ECJ. For these criteria, see e.g. Ojanen, footnote 207 *supra*, pp. 188-203, where he gives i.a. an explanation of the *acte clair* doctrine (p. 196 et seq.) under which a national court can refrain from making a reference to the ECJ. The first condition of that doctrine requires that the national court be ‘convinced that the matter is equally obvious to the courts of the other Member States and to the Court of

protect the fundamental ILO right to strike/industrial action and balance it with the market freedoms, just as the ECJ does. I discuss it further, mainly in my section 4.10.4, *infra*.

4.8 EC Case-law

It is notable that EC case-law recognizes the right to strike, although originally in staff cases. In *Union Syndicale*²⁶¹ the Court arguably recognized, first, the individual right to form and join an association and, secondly, the collective right to take action. The fundamental nature of those two rights was confirmed in *Bosman*²⁶² with respect to freedom of association in general and in *Maurissen*²⁶³ more specifically with regard to trade unions.

In *Albany*²⁶⁴ Advocate General Jacobs recognized, on the basis of this case-law, that ‘the right to take collective action in order to protect occupational interests in so far as it is indispensable for the enjoyment of freedom of association is also protected by Community law’.²⁶⁵ Hence, he did not recognize the right to strike as a fundamental right in EC law but as something to be protected. It is to be underlined that he presented his analysis in 1999 and relied only on a disputable interpretation of Article 11 ECHR, thus passing the European Social Charter concerning the right to strike²⁶⁶ and, especially, the ILO Convention No. 87 with its supervisory practice. The Court was able to pass the right to strike while it had to take stock – in relation to competition rules²⁶⁷ – only on collective bargaining and on its results, i.e. a collective labour agreement. It decided that these agreements outweighed fundamental competition rules, hence, they must themselves result from a fundamental right, namely a right to collective bargaining. Such a right without the right to strike would

Justice’; paragraph 16 of case 283/81 CILFIT [1982] ECR 3415. Regarding the right to strike/industrial action, especially apposite is Ojanen’s general statement that ‘[t]hus, when the point is new and invites construction of Community legal system as a whole and the objectives thereof, the Court of Justice alone is in the position to ponder such broad and significant questions’; *ibid.*, p. 201.

²⁶¹ Case 175/73 *Union Syndicale*, Massa and Kortner [1974] ECR 917, paragraph 14.

²⁶² See paragraphs 79 and 80 of *Bosman* (footnote 190, *supra*).

²⁶³ Joined Cases C-193/87 and C-194/87 *Maurissen and European Public Service Union v Court of Auditors* [1990] ECR I-95, paragraphs 11 to 16 and 21.

²⁶⁴ Case *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* is case C-67/96 [1999] ECR I-5751. Its joined cases were *Brentjens*, C-115-117/97, and *Drijvende Bokken*, C-218/97. As to *Albany* in defining the demarcation line between collective agreements and competition rules, see Bruun Niklas & Hellsten Jari (eds.), *Collective Agreement and Competition Law in the EU*, DJØF, Copenhagen 2001. As to *Albany* as a more general landmark showing the relationship between the economic and social dimensions in EC law, see Hellsten 2005 (footnote 107, *supra*), pp. 67-71.

²⁶⁵ Paragraph 159 of the Opinion of 28 January 1999.

²⁶⁶ He mentions only the right to collective bargaining in the European Social Charter, paragraph 146 of the Opinion.

²⁶⁷ I rhetorically recall the fundamental nature of the competition law regime (Article 81 EC) in the *acquis*; it ‘constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.’ See i.a. case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 36.

be anomalous, like collective begging. I will come back to this in the context of the free provision of services.

One ‘internal’ ground for accepting the entitlement to secondary (solidarity) action in EC law can be seen in the fact that in defining – in *Albany* - the scope of the immunity of collective agreements vis-à-vis competition rules the Court did not accept the third condition suggested by Advocate General Jacobs, namely that the relevant collective agreement should not ‘directly affect [...] relations between employers and third parties, such as clients, suppliers, competing employers or consumers’.²⁶⁸

The ECJ (sitting in plenum) also tackled in 1991 the right to strike in case *Dansk Slagterier* where it indirectly deduced the right to strike (and its indirect protection) from the concepts of a prudent businessman and (an *in casu* dismissed) force majeure.²⁶⁹ It was also essential that the likelihood and probable effects of a declared strike threat were assessed in their real national context where the Court took into account the Danish system of collective bargaining and the negotiation and strike practice of the Danish trade unions. The reasoning justifies concluding that this principle – a strike is to be assessed in its real national context – has general significance in EC law.²⁷⁰

In conclusion, the case-law of the ECJ also recognizes the right to strike and takes it in its real context.²⁷¹

²⁶⁸ See paragraph 193 of the Opinion of AG Jacobs. In case C-222/98 *van der Woude* [2000] ECR I-7111 AG Fennelly found this proposed restriction as undermining ‘the solidarity inherent in collective bargaining’ (paragraph 32 of the Opinion of 11 May 2000). The Court did not endorse this but confined itself to assessing the resulting collective agreement on the basis of judgment *Albany*. Germanotta and Novitz have found the solidarity statement of Fennelly to be brave and ‘most promising for advocates of an entitlement to take secondary action’ (footnote 209, *supra*, p. 77). The context (a collective sickness insurance) in *van der Woude* seems, however, to refer more to solidarity between those within the scope of a collective agreement than with those outside. Anyway, Fennelly’s statement was not just brave but also true.

²⁶⁹ Case C-338/89 *Organisationen Danske Slagterier agissant pour Jydske Andelsslagteriers Konservesfabrik AmbA (Jaka) v Landbrugsministeriet* [1991] ECR I-2315; the key words were ‘Force majeure’ and ‘Interruption of supplies owing to a strike’. In paragraph 21 the Court wrote, as follows: ‘Similarly, the possibility mentioned by the national court that the strike would have no effects on the undertaking concerned, because, for example, negotiations might be resumed, the strike postponed or an exception made for the transport of animals or foodstuffs, is not decisive. As the Court ruled in its judgment in Case 4/68 *Firma Schwarzwaldmilch GmbH v Einfuhr-und Vorratsstelle für Fette* [1968] ECR 377, an event is abnormal when it would have been considered improbable by a prudent businessman exercising due care. Such is not the case when the elimination of the effects of a strike, which is foreseeable in itself, depends on the occurrence of other events which are beyond the control of the trader concerned and incalculable in nature, as is shown by the Danish trade union practice described in these proceedings’. The Danish system of collective agreements and the way it operates in practice was accordingly referred to by AG Mischo in his Opinion of 22.1.1991, paragraph 16.

²⁷⁰ Also see paragraphs 18 to 21 in comparison to paragraph 24 that is no longer bound – as to its wording – to the Danish circumstances.

²⁷¹ The history of EC social law reveals some traces of a similar national context, in fact of a margin of discretion within social and economic policy. In Case 155/80 *Oebel* [1981] ECR 1993 the Court discussed working hours in relation to the free movement of goods. It

As mentioned, the issue (the right to strike in relation to internal market freedoms) is made more complicated due to the diversity of substantive national strike laws and practices. However, that situation is, regarding fundamental rights, not unique to strikes. In *Omega Spielhallen* the Court had to assess fundamental values, i.e. human dignity, enshrined in the German Constitution (Basic Law), in relation to the free provision of services. By its question, the referring court asked i.a. whether the ability which Member States have, to restrict fundamental freedoms guaranteed by the Treaty, namely the freedom to provide services and the free movement of goods, is subject to the condition that that restriction be based on a legal conception that is common to all Member States (paragraph 23). The answer of the Court, following the standard formula of the observance of fundamental rights both in EC and national law (cited above), was rather straightforward:

‘37 It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. ‘

Hence, despite the diversity, EC law may protect fundamental rights. There seems to be no grounds for concluding that this diversity aspect would receive in principle a different treatment with respect to strikes, on the contrary.

4.9 Right to Strike in the Framework of Free Provision of Services

4.9.1 General Aspects

Before entering into a detailed reasoning on the convergence of the doctrines on the free movement of services (Arblade-test) and fundamental rights, so as to shape the justification for a strike within services, it is appropriate to comment in one section on the basis, a legal source or principle, of such justification. Are there relevant competing justifications?

As alternative hypotheses one can distinguish six such justifications, which are to claim: (i) a ‘Social Policy exclusion’ or ‘Title XI (of the EC Treaty) exclusion’ from the ambit of services (Articles 49 and 50); (ii) a ‘strike exclusion’ or ‘industrial action exclusion’, respectively; (iii) an ‘Albany-immunity’; (iv) a ‘fundamental rights’ exclusion, respectively; (v) a public policy defence; and (vi) a justification by convergence of the doctrines on restrictions on services (Arblade-test) and

concluded that ‘national rules governing the hours of work, delivery and sale in the bread and confectionery industry constitute a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty’. A further indication was the wave of cases on Sunday trading in the late 1980s. Shop owners claimed that compulsory closing on Sundays was in breach of Article 30 (now 28) EC. In Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851 the Court, referring to *Oebel* as cited above, held that ‘(t)he same consideration must apply as regards national rules governing the opening hours of retail premises. Such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the Member States’ (paragraph 14).

fundamental rights. Each of them is both defensible and subject to more or less critical comments. I will comment on them briefly.

A ‘Social Policy exclusion’ or ‘Title XI exclusion’ (i) would mean that matters falling under EU Social Policy do not fall at all under Articles 49 and 50 EC. By definition this *prima facie* looks attractive for any labour lawyer, highlighting an independent development and status of EC labour law.

However, the ‘Social Policy exclusion’ faces considerable problems, both in number and contents, I am sorry to say. First, an elementary point is that the text of the EC Treaty does not include any such exclusion. Furthermore, finding Title XI and the Services Chapter of the Treaty as mutually exclusive would for the sake of consistency obviously also require one to apply the same principle to the free movement of workers. Do we e.g. want to deny e.g. the effect of the 1989 Community Charter, referred to by Article 136 EC, on the free movement of workers? A further fundamental comment is that if mutual exclusivity were to be the case, it would have been impossible to write already in *Walrave* (see section 4.2) that ‘regulating in a collective manner gainful employment’ falls under Article 49 EC. Namely, as is common ground, ‘gainful employment’ as such falls under Title XI. Next to this, against ‘mutual exclusivity’ speaks, or, demonstrates, also the presence of ‘the functioning of the common market’ in Article 136 EC, although as a (de facto quite unsuccessful) source of upwards harmonisation.²⁷² It is there, anyway. Furthermore, adopting the labour law directives on collective redundancies, transfer of undertakings and employer’s insolvency during the 1970s under Article 94 EC shows that Title XI is not any exclusive base for EC labour law, far from that. Article 136 EC also refers to the approximation of laws etc. On the other hand, the Posted Workers Directive shows how the Services Chapter may also produce labour law (see chapter 1). Finally (supposing a ‘Social Policy exclusion’), the *Arblade*-test or doctrine, with ‘protection of workers’ as one of its elementary components, would not exist in its present form because the ECJ would have applied this ‘Social Policy exclusion’ instead. Judgment *Seco* would obviously have declared that the extension right of national minimum wages would flow from Title XI, instead of ‘Community law’ (see section 1.2.2). Not just the expressed ‘face’ but also the ‘heart’ (legal source in the Treaty), i.e. Title XI, of justifying labour law matters (not ‘restrictions on a fundamental freedom’ in this thinking) would differ from the established practice. The effect of labour law issues on the freedom to provide services would be assessed and justified in a completely different way from what the European legal audience has had under its own eyes for decades. These comments are not exhaustive. Summing up one may state that the economic and social factors in EC law are also legally deeply and mutually interlinked. They are not exclusive.

I have discussed the ‘strike/industrial action exclusion’ (ii) in section 4.3, with the conclusion that a strike in an internal market context falls under the Treaty, ultimately

²⁷² In case-law the negation of the mutual exclusivity is graphic e.g. in Joined cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887. The ECJ first repeated the programmatic nature of Article 117 (now 136) EC (paragraph 25) but added (in paragraph 26): ‘26 Admittedly, the fact that the social policy objectives laid down in Article 117 are in the nature of a programme does not mean that they are devoid of any legal effect. They constitute an important aid, in particular for the interpretation of other provisions of the Treaty and of secondary Community legislation in social matters [...]’

under Article 2 EC. On the other hand, Article 137(5) EC shows that we cannot expect any EU strike directive that, in theory, could – like reflecting ‘the purpose of the founders of the Community’ – elaborate the Treaty by excluding strikes from the legal ambit of the fundamental freedoms. Neither has the Monti-regulation 2679/98 such an effect as judgment *Schmidberger* (see section 4.10.1) indirectly shows: there is no reference to the Regulation although the case concerned the free movement of goods. The Regulation clearly reflects a high protection of the fundamental right to strike (within the free movement goods, and, by analogy, within services), as finally guaranteed in its details by national law. As secondary legislation it, however, cannot and does not exclude the right to strike from the fundamental freedoms (in the event that the ECJ decides that a strike falls under a freedom).

In *Albany* (see further especially footnote 312 and the references in footnote 264, *supra*) the ECJ set up a conditioned immunity of (sectoral) collective agreements from competition rules. The hypothetical assertion is that by analogy a similar quasi-exclusion (‘Albany-immunity’ (iii)) would/should also be established with respect to strikes in relation to Article 49 EC. In *Albany* the judgment was constitutional for EC social policy and labour law, being anchored to the particular task of the Community ‘to promote throughout the Community a harmonious and balanced development of economic activities’ and ‘a high level of employment and of social protection’ (Article 2 EC). However, while *Albany*’s final normative target was the relationship between collective agreements and competition rules, the ECJ will not literally repeat itself by assessing or justifying strikes within services. If the question were the setting up of a demarcation line between strike rules/a strike and competition rules, *Albany* (with its conditions) would be, by definition, ‘directly applicable’. Still, as a landmark in striking the balance between the social and economic factors it is self-evidently of high value in any corresponding constitutional interpretation of the Treaty. Accordingly, I, too, will resort by analogy to *Albany* in considering the final justification criteria of a concrete strike (see section 4.10.4).

An overall ‘fundamental rights’ exclusion (iv) is with respect to strikes a natural submission in the sense that Article 136 EC requires us to ‘have in mind’ the European Social Charter of 1961 and the 1989 Community Charter of Fundamental Social Rights of Workers. Both expressly enshrine the right to strike. While their interpretative value is clear,²⁷³ they do not offer any comprehensive defence against services rules of the Treaty. The leading precedent *Schmidberger* shows that the relative ones amongst fundamental rights/human rights may be balanced against fundamental market freedoms (see section 4.10.1). While the contents of the ILO right to strike a priori exclude its restriction unless strictly profession-related (for example the army and police force) or on societal grounds (under exceptional circumstances), it is nowhere an absolute right. It therefore falls to be balanced.

A public policy (*ordre public*) defence or exclusion (v) is of specific value but does not a priori free strike rules or a concrete strike from the fundamental freedoms, as the ECJ confirmed e.g. in *Arblade*. I discuss this further in section 4.9.3. Another aspect is that case-law under the EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters shows how

²⁷³ On the 1989 Charter, see e.g. joined cases C-397/01 to C-403/01 *Pfeiffer*, nyr, paragraph 91. On the 1961 Charter, see e.g. case 24/86 *Blaizot* [1988] ECR 379, paragraph 17.

fundamental rights are a necessary element in assessing the contents of the public policy, and that the Member States are in principle free to define the contents of their public policy while the limits of that concept are a matter for interpretation of the Brussels Convention (nowadays the regulation 44/2001/EC), finally by the ECJ (judgment *Krombach* ²⁷⁴).

What is then the profile of the Arblade-test, as complemented by the fundamental rights doctrine (*Schmidberger*) (vi). Given the text in previous chapters, it is not necessary to present the Arblade-test generally, its position in case-law, etc. Within the social part of the restrictions on the free provision of services, justified by general good or interest it embodies the case-law since 1979 in judgment *van Wesemael*. ²⁷⁵ It is to be expected that the ECJ would follow that line when assessing the status of strikes within services. *Schmidberger* is a fresh landmark of the ECJ but there, too, no serious reason leads to the conclusion that its principal line, weighing between fundamental rights and a market freedom, would not be followed with respect to the fundamental right to strike/industrial action.

However, one additional aspect is worth particular attention within the Arblade-test before considering its application to strikes. It must be highlighted at the outset that concerning (minimum) wage-setting by law or collective agreements within the PWD, or as a modification of the Arblade-test, the ECJ as a principal position (as a ‘well-established’ interpretation of ‘Community law’, not just of ‘common market’) in *Seco* legitimised *state measures* (the extension right; see section 1.2.2, *supra*) against low-wage competition from other Member States. I maintain that this test must *a fortiori* allow measures (industrial action) by workers (the ‘affected workforce’; *Webb*, paragraph 19) themselves, as well as by their organisations.

4.9.2 Elaborating Remarks; Relation to Earlier Case-law

I first resume in brief the normative structure to be used in assessing a national strike regarding posting workers in the framework of the free provision of services. With this I mean a situation where a national trade union resorts to industrial action in order to reach a (substitute) collective agreement implementing the Posted Workers Directive 96/71 (PWD).

As argued above, the right to strike is a fundamental right, essentially protected by the relevant international treaties (of which the ILO right to strike also sets up the EU standard) and the common constitutional tradition of the Member States. Furthermore, Article 136(2) EC (taking account of the diverse forms of national practices, in particular in the field of contractual relations) must also be observed in interpreting Articles 49 and 50 EC which also have the horizontal direct effect. I see the effect of Article 137(5) EC in the principle that whereas it reflects the reluctance of the European legislator to interfere in the right to strike, it is a legitimate expectation that the Court will find itself equally bound – although *mutatis mutandis* – to respect the inherent national margin of appreciation.

²⁷⁴ See Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 22.

²⁷⁵ See footnote 32, *supra*.

As to the Treaty, it would be no surprise to see that the Court would rely even on the leading Articles 2 and 3 EC, defining the objectives and tasks of the Community, and on an ‘effective and consistent interpretation of the provisions of the Treaty as a whole’ as the Court declared in *Albany*, paragraph 60.

The Posted Workers Directive (PWD) furthermore fills the normative ‘space’ concerned. While its Recital 22 states that the PWD ‘is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions’, the PWD is not without significance here; far from it. Recital 22 must be read as meaning that the PWD, being secondary legislation, does not weaken or dilute the status of the (national) right to strike from what it would be without the PWD. Otherwise it is highly important to note that the Directive itself means a convergence of the consolidated market freedom (i.e. fair competition) and protection of the rights of workers as its Recital 5 demonstrates. That was also counted of weight in judgment *Wolff & Müller*, in paragraphs 41 and 42, as follows: ²⁷⁶

41 Inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay, [²⁷⁷] a matter which it is for the referring court to determine, such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services provided that the conditions mentioned in paragraph 34 hereof are met. [²⁷⁸]

42 Moreover, as the Austrian Government has rightly pointed out in its observations, there is not necessarily any contradiction between the objective of upholding fair competition [²⁷⁹] on the one hand and ensuring worker protection, on the other. The fifth recital in the preamble to Directive 96/71 demonstrates that those two objectives can be pursued concomitantly.

These passages present, when read together, indeed, one and the very first post-PWD application of the Arblade-test that the Court uses in the interpretation of Article 49

²⁷⁶ On that decision, see section 2.2.5, *supra*.

²⁷⁷ It is, however worth mentioning here, too, the early decision in 1974 where the Court, although in the field of free movement of workers, confirmed the right to protection for domestic workers against low wage competition: case *Commission v France*, 167/73 ECR [1974] 359, paragraph 45 (quoted in connection to footnote 12, *supra*). One may clearly conclude that this protection is recognized outside an employment relationship. By analogy this supports the submission that national trade unions are not prohibited from industrial action against a foreign service provider by virtue of the fact that they have no members in the companies concerned.

²⁷⁸ The referred paragraph 34 of *Wolff & Müller* conditioned the restriction with the standard formula in the Arblade-test, as follows:

‘...justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it [...].’

²⁷⁹ Already judgment *Vander Elst*, paragraph 25, in 1994 used this competition argument, by referring to the Belgian system of industrial relations that prevented workers from being exploited and competition distorted. See section 1.2.2, *supra*.

and 50 EC. It is essential to note the incorporated twofold proportionality assessment (appropriateness – necessity) with respect to restrictions on the free provision of services. As shown earlier in this reasoning (Chapter III), in *Commission v Germany* (paragraph 24)²⁸⁰ the ECJ in April 2005 somewhat rewrote, while keeping the contents, the formula concerned in the Arblade-test regarding the definition of the minimum rates of pay. It was essential, in line with earlier case-law, to establish the protection of workers – instead of any interest of the posting employer - as the very yardstick of the proportionality assessment. There the analysis shows that finally the proportionality test remained as a safety valve against social protectionism or unnecessary restrictions on free movement.²⁸¹ However, it is more than likely that in assessing the right to strike in this context the ECJ will base itself, next to protecting the right to strike as a fundamental right and in its ILO form, on its own case-law, especially *Commission v. France* (quoted at footnote 12, *supra*), *Seco, Dansk Slagterier, Arblade, Wolff & Müller* and *Commission v. Germany*. I will come back to this after having discussed first the Swedish lex Britannia in the light of the Arblade-test. That is what we obviously can do even without adding the fundamental rights aspect to that test. Experience has shown that lex Britannia is no industrial action automat. In 2004 the Swedish Building Workers' Union concluded 98 substitute collective agreements with foreign employers posting workers into Sweden and in only three cases was it required to resort to industrial action (blockades, boycotts etc.).²⁸²

4.9.3 Public Policy (*ordre public*) Provisions

A further important - but now still preliminary - question in EC law is whether national strike laws are of *ordre public* (public policy) nature in the context of the free provision of services. I will have to pass over any deeper reasoning thereon.²⁸³ However, the so-called lex Britannia (i.e. the set of certain provisions in the Swedish Codetermination Act) elaborates the Swedish constitution by stipulating that the Swedish trade unions may resort to industrial action so as to reach a collective

²⁸⁰ Case C-341/02, judgment 14.4.2005, nyr. On that judgment see sections 3.3.3 and 3.4, *supra*.

²⁸¹ For clarity's sake it is to be underlined that this proportionality test is no novelty in posting case-law, for example *Rush Portuguesa* (and the 12th recital of the Preamble to the PWD) in its obiter dictum of paragraph 18 noted it (in 1990) by referring to enforcement ('guarantee of observance' in the PWD) of national pay rules by *appropriate* means. So also did judgment *Vander Elst* in 1994 in an obiter dictum in paragraph 23.

²⁸² See press release 'Kommentar med anledning av TT-uppgifter: 98 avtal med utländska företag 2004' of 29 April 2005, available via www.byggnads.se.

²⁸³ As to the concept of *ordre public* provisions, the ECJ defined it in *Arblade*, as follows (paragraph 30): '...concerning the classification of the provisions at issue as public-order legislation under Belgian law, that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.' (emphasis added) In 'fundamental rights language' one may state that the Swedish right to strike/industrial action – like the Finnish one, included in case *Viking*; see section 4.10.5, *infra* – is an expression of the common constitutional tradition that has its special status under Article 6(2) EU.

agreement under Swedish law, like the abovementioned substitute agreement, even if the foreign employer posting workers into Sweden is bound by a collective agreement abroad. Hence, *lex Britannia* seems to belong to the Swedish *ordre public* (public policy) and to be a (set of) mandatory provision(s) falling under Article 7(2) of the Rome Convention on Law Applicable to Contractual Relationships.²⁸⁴ Besides, being the cornerstone of the Swedish labour law and labour market system²⁸⁵ in a cross-border context, the value of *lex Britannia*, too, was highlighted by a declaration attached to the Accession Act of Sweden.²⁸⁶

It is necessary to observe that public policy (*ordre public*) provisions do not escape from the sphere of the fundamental freedoms in the Treaty. The Court stated this e.g. in *Arblade* (paragraph 31) by referring simply to the need to avoid undermining the primacy and uniform application of Community law. It continued by stating how ‘(t)he considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest.’²⁸⁷ Hence, even *ordre public* provisions are subordinate to the *Arblade*-test.²⁸⁸ This brings me to discuss the justification of *lex Britannia*.

²⁸⁴ Being inherently linked to the core of the Swedish labour market model, *lex Britannia* seems to clearly reflect, indeed, the political, social *and* economic order of the state. Ulla Liukkunen points out in her dissertation *The Role of Mandatory Rules in International Labour Law*, Talentum, Helsinki 2004, p. 139, that one part of the *lex Britannia* (section 25a of the Swedish Co-determination Act) is ‘clearly’ internationally mandatory; according to that provision, a collective agreement invalid under foreign law due to its emergence from an industrial action is anyway valid in Sweden if the industrial action is valid under the Swedish Co-determination Act. She further refers to Swedish *travaux préparatoires* (SOU 1998:52, p. 69) according to which ‘provisions in the Act on the freedom of association, the right to negotiate as well as provisions on the peace obligation when a collective agreement has been concluded have been regarded as internationally mandatory.’ In this context *lex Britannia* (Sections 25a, 31a and 42, subparagraph 3, of the Co-determination Act) seems to form one entity that as a whole amounts to public policy (*ordre public*) provisions.

²⁸⁵ I recall how the EHRC emphasized the status of collective agreements in the Swedish labour market model in case *Gustafsson v. Sweden*; see footnote 314, *infra*.

²⁸⁶ See the Declaration No. 46 by the Kingdom of Sweden on social policy, annexed to the Accession Act of Austria, Finland, Norway and Sweden, OJ C241, 29.8.1994: ‘In an exchange of letters between the Kingdom of Sweden and the Commission, the Kingdom of Sweden received assurances with regard to Swedish practice in labour market matters and notably the system of determining conditions of work in collective agreements between the social partners’.

²⁸⁷ On similar lines the Court reasoned in *Omega Spielhallen*, as follows: ‘30 However, the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation (Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7). In addition, the concept of ‘public policy’ in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, by analogy with the free movement of workers, *Van Duyn*, paragraph 18; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 33). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 17)’.

²⁸⁸ As to *Arblade*-test in general, see section 1.2.3, *supra*.

4.9.4 Justification of Lex Britannia

Before applying the above-mentioned principles of EC law into a concrete industrial action it is appropriate to discuss in brief the status of the Swedish lex Britannia in the light of the Arblade test. That is the reference question (B) of the Labour Court of Sweden (see section 4.1). I recall in summary its components: (i) abolition of any discrimination and even tenuous restrictions on the free provision of services; (ii) existence of justifying overriding requirements of public interest (iii) that have not been met by rules of the home state (equivalence or mutual recognition) and (iv) proportionality with an objective justification (appropriateness and necessity – ‘not going beyond’ – of the national measures concerned).

A preliminary remark is that the lack of any reference to wages in the Swedish law implementing the Posted Workers Directive is not a decisive factor in the justification of lex Britannia. This simply leads to the conclusion that the obligations deriving from the EC Treaty (i.e. the Arblade-test) apply, and the Directive is of (only) interpretative value.

By giving precedence to a subsequent collective agreement under Swedish law (Co-determination Act, Section 31(a)) the national law incorporates unequal treatment and indirect discrimination of foreign employers posting workers into Sweden.²⁸⁹ A Swedish employer enjoys the legal protection granted to the previous agreement, the inherent peace clause included. That unequal treatment is, however, an inherent consequence of the basic purpose of the Act, namely to guarantee the realisation (i.e. implementation(!)) of the national benefits covered by the PWD by means of collective agreements. Hence, the purpose is to guarantee equal treatment (or to block low wage competition or social dumping²⁹⁰) and fair competition within that sphere of benefits. It is in fact an *obligation* established by the PWD for the Member States with erga omnes minimum wages and such an obligation is by definition more than that required by the Arblade-test, namely a *public interest* recognized by the Community. In this sense, the collective agreements in Sweden, the substitute agreements in particular, do have the same function as minimum wage laws or collective agreements of the formal erga omnes effect in many other Member States. In other words, collective agreements based on lex Britannia put into practice the equal treatment principle enshrined in Article 50(3) EC. This is besides in line with Article 137(3) EC which refers to the implementation of directives (like the PWD) by means of collective agreements. Furthermore, this corresponds with the second subparagraph of Article 3(1) PWD that leaves the definition of the minimum wage concerned to the national law and labour market practice. For all these reasons the formally inherent, indirect discrimination via lex Britannia must be regarded as fulfilling the requirement of overriding reasons of public interest (see judgment *Wolff & Müller*, paragraph 41, quoted above). Here I especially recall how the Court in *Seco*

²⁸⁹ An a priori forbidden discrimination established; criterion (i) in Arblade-test. That lex Britannia involves indirect discrimination is also the position of e.g. Jonas Malmberg, *Metoder att motverka låglönekonkurrens i Sverige*, in Malmberg (ed.) *Låglönekonkurrens och arbetstagares integritet*. Arbetslivsinstitutet, Arbetsliv i Omvandling, 2000:2, p. 19-20. Sigeman, footnote 202, *supra*, pp 492-3, also finds that lex Britannia in practice means treating the visiting service providers different from domestic ones and foresees ‘good grounds’ (‘goda skäl’) for its justification (which he does not rule out).

²⁹⁰ See in the Swedish travaux préparatoires Ds 1994:13, p. 333.

legitimised state measures against low-wage competition. It *a fortiori* means that measures by the affected workers themselves or by their organisations must be regarded as legitimised.²⁹¹

Fulfilling the equivalence criterion of the Arblade-test is manifest unless the law of the home state would exceptionally oblige the employer to comply with the pay rules of Sweden as the host state. That could create a relevant debate whether it would be justified to require a collective agreement under Swedish law as a means of implementing the extension right of national minimum wages that the ECJ established in *Seco*, with a reference to enforcement with appropriate means (see section 1.2.2, *supra*). It is in fact an exception to the equivalence criterion; more money does not violate equivalence.²⁹²

As a whole, the Swedish system (*lex Britannia*), due to its status as realising a fundamental Community principle (i.e. equal treatment, as enshrined in Article 50(3) EC) must be regarded as appropriate for its purpose and proportionate as to the yardstick, protection of workers. It does not result in automatically and manifestly disproportionate pay benefits to workers as individual strikes or other industrial action in theory may do.²⁹³

In sum, in the light of settled case-law, *lex Britannia* as such passes the Arblade-test and is compatible with Articles 49 and 50 EC. This conclusion becomes endorsed if one adds, regarding the ‘overriding reasons’ and proportionality criteria of the Arblade-test, the legal consequences adhering to right to strike/industrial action as a *fundamental right* in EC law.²⁹⁴

²⁹¹ Concluding: criterion (ii) in Arblade-test fulfilled.

²⁹² Concluding: criterion (iii) in Arblade-test fulfilled. As far as the author knows, the only national implementation law of the PWD that includes such an obligation (of the home state), clearly justified as such, be exactly the Swedish law. Also see – by analogy – the philosophy in Wolff & Müller where the liability rule of the host state *added* at least one more solvent debtor (paragraph 40). A detailed analysis reveals other aspects in the Swedish system with such an added value, like the independent status (*locus standi*) of the trade union to institute judicial proceedings so as to execute a collective agreement under Swedish law. If the posted workers do not act, the union may institute proceedings so as to reinforce the union’s compensation interest even against the workers’ will (arg. Litigation in Labour Disputes Act - lagen om rättegången i arbetstvister (1974:371)). Further on, as a standard procedure, a substitute agreement also subordinates the employer to the wage control mechanism in the sector-wide national collective agreement in construction. The employer has to declare to the trade union each month the wages paid.

²⁹³ Concluding: criterion (iv) in Arblade-test fulfilled. The opposite position would mean to regard as inappropriate and disproportionate ultimately the whole Swedish labour market model with its emphasized role of collective agreements. The fact that Sweden has not officially indicated implementing the PWD via collective agreements cannot be decisive as this is at the end of interpretation of Articles 49 and 50 (ex 59 and 60) EC.

²⁹⁴ This study has reached the conclusion that the fundamental ‘ILO right to strike/industrial action’ also binds the EU. ‘The ILO right to strike’ is ‘one of the essential means through which workers and their organizations may promote and defend their economic and social interests’ and it is therefore ‘a civil, political and socio-economic entitlement’ (see section 4.4.2 at footnotes 212 and 213, *supra*). It *a priori* legitimises trade union action in the Internal Market, certainly against low-wage competition, within the concept of the protection of workers; see further section 4.10, *infra*.

4.10 Converging the Doctrines on Services and Fundamental Rights

4.10.1 Proportionality and Acceptability Aspects

In *Schmidberger* the Court ruled in the field of free movement of goods. In that sense I recall that while the restriction rules regarding the four fundamental freedoms are not entirely parallel, they too can be used by analogy unless there are obvious reasons not to. Seen from the point of view of the fundamental rights, the interpretations should be even more parallel, irrespective of against which of the four freedoms a fundamental right is to be balanced. Anyway, as to the fundamental rights of workers, there should be no essential difference, whether the question is one of the free provision of services or the free movement of goods. However, in *Schmidberger* the Court reasoned, as follows:

78. First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649.

However, regarding the particular justification of *lex Britannia*, it is also appropriate to consider an additional argument: the European Social Charter (ESC), which is also referred to by Article 136 EC.

Article 6(4) ESC refers to restrictions (obligations) 'that *might* arise out of collective agreements previously entered into' (see section 4.4.4; italics by JH). It is the only international treaty dealing expressly with the question of previous agreements. By virtue of Article 307 EC the Swedish trade unions and government may invoke it, due to the ratification of the ESC by Sweden on 17 December 1962 with no reservation with respect to Article 6(4).

As to substance in the ESC, the Digest of the Case-law of the European Committee for Social Rights (ECSR) in March 2005 describes generally the permitted objectives of collective action, as follows:

'Article 6§4 applies to conflicts of interests, i.e. generally conflicts which concern the conclusion of a collective agreement. It does not concern conflicts of rights, i.e. related to the existence, validity or interpretation of a collective agreement.

Within those limits, the right to strike should be guaranteed in the context of *any* negotiation between employers and employees in order to settle an industrial dispute.' (emphasis JH; see the Digest, p. 36; available via <http://coe.int>). Furthermore, the question of previous agreements is not a dead letter in the ECSR practice. Concerning a breach of a currently valid collective agreement (in Malta) the ECSR wrote "Admittedly, the Committee has always accepted the fact that collective action could not be taken with regard to *matters governed* by collective agreements if legal disputes, rather than conflict of interests, were at stake (see Conclusions I [1970], p. 38). However, this did not apply to matters subject to bargaining during the negotiations but *not covered* by the agreement, which could not be considered an obstacle to such action" (Conclusions XIII-2 [1995], p. 283; italics by JH). The case is reported by Lenia Samuel, Fundamental social rights. Case-law of the European Social Charter. Second edition, Council of Europe Publishing 2002, p. 155.

Hence, the Article 6(4) ESC clause on *possible* restrictions on industrial action by previous agreements may have an impact on contractual relations even between parties that have concluded an agreement. The right to action exists regarding matters 'negotiated but not covered' by a previous agreement. *A fortiori* Article 6(4) ESC legitimises the abolition of the peace obligation between parties that have *not* concluded any previous agreement. This is exactly the case in the Swedish *lex Britannia*.

79. Second, whilst the fundamental rights at issue in the main proceedings are expressly recognized by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued [...].

80. Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed [...].

A linguistic remark is that, as justifying restrictions on fundamental rights, the expression ‘pressing social need’ (paragraph 79) self-evidently means a need seen from the whole society’s point of view. Accordingly, viewing each of the freedoms concerned ‘in relation to its *social* purpose’ (paragraph 80, emphasis added) means the purpose for the whole society, hence not just an issue ‘more or less’ protecting the poor or powerless people; the French wording manifests this with the expression ‘leur fonction *dans la société*’. On the other hand, the freedoms concerned were qualified as constituting ‘the fundamental pillars of a democratic society’ (see paragraph 79). Substantively I submit that the fundamental right to strike/industrial action amounts to the same qualification as freedom of expression and assembly: a fundamental pillar of a democratic society. However, to make this argumentation more operational, I resort, in discussing possible interferences with the right to strike/industrial action, to the developed concept present in paragraph 80 of *Schmidberger*: outlawing interferences that *impair the very substance of the right guaranteed*. This does not mean that the other paramount ‘restriction threshold’ in paragraph 80, the objective of *general interest*, would not be important. It certainly is, but case *Laval* (with its Swedish context) does not require any detailed discussion on the application of such restrictions.

However, some further general comments are appropriate regarding the ‘general interest’ criterion. First, the right to strike/industrial action finally has its ‘EU base’ (hence, next to the applicability of the ‘ILO right to strike’) in the founding principles of the Union, enshrined in Article 6(1) TEU: liberty, democracy, respect of human rights and fundamental freedoms, and the rule of law. Consequently, the restrictions of that right ultimately must also qualify even on that level. Second, in a cross-border context it is a Community concept, but it might be of some significance that paragraph 80 of *Schmidberger* does not refer to it.²⁹⁵ Still, in posting of workers a natural

²⁹⁵ In Case C-62/90 *Commission v. Germany* [1992] ECR I-2575, paragraph 23 (where to *Schmidberger*, paragraph 80, refers), this is clearly spelled out by referring to general interest pursued by the Community. That case concerned free movement of medicinal products.

association anyway exists with the settled case-law that ‘protection of workers’ represents (overriding reasons of) general interest that may restrict the free provision of services.²⁹⁶ Furthermore, because *Seco* (see section 1.2.2, *supra*) legitimised state measures against low-wage competition, measures by the workers affected and their organisations must *a fortiori* be regarded as legitimate under EC law. This (finally ‘protection of workers’) in fact excludes even considering restrictions on the right to strike, as far as its use remains genuine, under any ‘general interest’ of the Community. At the same time proportionality and acceptability of restrictions on the right to strike (‘that may not impair the very substance of that right’) obviously leads to concrete conclusions. I will turn my attention to them now.

The *Schmidberger* formula proportionality – acceptability (‘disproportionate and unacceptable interference’ in paragraph 80 of *Schmidberger*) finally for its part also highlights the question about the two types of restrictions present in the *Laval* case: restrictions on the free provision of services and restrictions on a fundamental right. I will discuss them together since they both qualify the one and same phenomenon, the interference that may ultimately impair the very substance of the right to strike.

Hence, the *Laval* case for the first time in the field of EC labour law²⁹⁷ incorporates in the one and same case the proportionality assessment as a part of two a priori separate toolkits of reasoning in EC law: (i) justification of restrictions to the fundamental freedom to provide services (fourth part of the *Arblade*-test) and (ii) proportionality test in restricting a fundamental right of workers. The fundamental rights doctrine adds the acceptability assessment (of a restriction) to this already complicated structure. Both the proportionality and acceptability assessments must be first put into their context and outlined. Here I take it for granted that the Court will keep the protection of workers as its legal yardstick for proportionality, as in the relevant, and also in the recent case-law.

In distinguishing between acceptability and proportionality, it should be noted that the acceptability assessment is highly sensitive. While it has at one level a very concrete dimension (with the exploitation of the Latvian workers as the core), it is at the same time abstract and linked to social values. It comes close to, or even within, purely political decision-making in relation to which any constitutional court is extremely careful and grasps only manifest cases of excess of the limits of discretion (by the Member States in this case).²⁹⁸ Another sensitive dimension simply is: who decides

²⁹⁶ Judgment *Arblade*, paragraph 36.

²⁹⁷ I see it as being justified to place the posting of workers in the framework of services (and the Posted Workers Directive) here with this qualification ‘EC labour law’ having in mind the other side of the context: guaranteeing fair competition between undertakings.

²⁹⁸ I may refer to a framework applied by the Court, although it was in exploring proportionality of a Community act, in the case C-84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union [1996] ECR I-5755; the keywords were: Council Directive 93/104/EC concerning certain aspects of the organization of working time - Action for annulment. There the Court reasoned, as follows:

‘58 As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the

what an acceptable restriction is? Is it the Labour Court of Sweden or the European Court of Justice. The prerequisite is that it is the European Court of Justice that answers that question. Furthermore, the legal concepts present are either its own creatures or otherwise fall under its ultimate jurisdiction. On this basis, I think, the ECJ will deem itself competent, if not the solely competent body, to decide the acceptability of a restriction to a fundamental right. That is what it also did in *Schmidberger*, besides also deciding there the proportionality assessment (paragraphs 90-94). It is, of course, conceivable that the ECJ confines itself to establishing the parameters or otherwise guiding the acceptability assessment and leaves its final application to the Labour Court of Sweden. In any case, in applying the final formula ('interference impairing the very substance of the right[s] guaranteed', *Schmidberger*, paragraph 80), the ECJ will rely on the right to strike as it is elaborated in the Swedish context.

There remains the question about which court will make the proportionality assessment concerned. The examples of e.g. the recent posting judgments *Wolff & Müller v. Pereira* and *Commission v. Germany* would justify concluding that the ECJ would confine itself to establish the criterion (or criteria), the yardstick, but otherwise leave the application for the national court.²⁹⁹ However, while there are now two types of proportionality, and one of them is inherently linked to acceptability (under the umbrella of substance-impairing interference), a reasonable guess is that the ECJ will decide, if not the whole 'package', at least anything having essential significance in Community law. One has to bear in mind that on this occasion the industrial action concerned one school site in one country. Another time the same action may concern e.g. even large parts of transport (services) in several countries and reach the desk of the ECJ. Judgments *Bostock* and *ERT v DEP* provide clear guidance by explaining how³⁰⁰ the ECJ - where the national rules fall within the scope of Community law - must provide in a preliminary ruling all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights whose observance the Court ensures. This already implies the obligation of a national court to protect the fundamental rights recognised by the Community and the ECJ.

4.10.2 Lot of Danish-Swedish Model

A further relevant but case-related feature is that the relevant posting law precedents (notably *Webb*,³⁰¹ *Seco*, *Rush Portuguesa*, *Vander Elst*, *Arblade*, *Finalarte*, *Portugaia*, *Wolff & Müller* and *Commission v. Germany*) in one way or another dealt with restrictions imposed by the state (and on the broad line justified by the Court whenever subject to the very ruling on a concrete question). In *Arblade* and *Portugaia*

limits of its discretion.' By replacing 'the Council' by 'a Member State' one might also bring a viable formula to the acceptability assessment.

²⁹⁹ On this aspect, see sections 3.3.3 and 3.4, *supra*, in the context of judgment *Commission v. Germany*, case C-341/02.

³⁰⁰ See Case C-2/92 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* [1994] ECR I-955, paragraph 16, and Case C-260/89 *ERT v DEP* [1991] ECR I-2925, paragraph 42,

³⁰¹ I take the liberty to insist on the connection between judgments *Webb*, *Seco* and *Arblade*, see especially sections 1.2.2 and 1.3.6, *supra*, but also the end of footnote 318, *infra*.

the questions subject to preliminary ruling involved, of course, national collective agreements but such as were declared of universal applicability (*erga omnes*) by the state. *Mutatis mutandis*, in *Omega Spielhallen* the restriction (ban on ‘play killing’ games) concerned one type of entertainment game and e.g. in *Läärä*³⁰² certain types of gambling (slot) machines, both in any case rather limited as to their overall societal significance. Differently (although not in contrast), the particular feature of the *Laval* case is that it concerns restrictions caused by a national labour market system that relies on the acts of *private* legal actors, namely collective labour agreements. The final means of reaching them is the right to strike/industrial action. This way it is also the anchor of the whole labour market model of Sweden (and Denmark). Linked to this, in terms of *Schmidberger*, paragraph 80, what might be *impaired* is finally that labour market model. Therefore that model – having its legal formulation in the *lex Britannia* - is finally subject to judgment in the *Laval* case, with the possibility of keeping that model in a Member State of the Community. And what is elementary for a Member State (or two Member States) is also deeply tied to the essence of the Community itself. The Swedish and Danish model, in realising social justice and order (fair competition and prevention of social dumping), certainly deserves its place in the Community.

With the remarks above I want to highlight the challenge ahead in the case. It is not just combining the Arblade-test and the doctrine of accepting restrictions for a fundamental right in a way that is coherent and sustainable from the point of view of the *Community* law; it also has to serve the Member States concerned. That is also the message that stems – next to Article 3(1) and 3(8) PWD - from *Omega Spielhallen*:³⁰³ accepting diversity in the common legal framework.

4.10.3 Convergence of the Two Doctrines in Practice

However, while we live in the European legal *Community*, I see it as being natural that the ECJ in making this convergence will take as its basis the free provision of services, one of the fundamental elements of the internal market that is a constituent element of the whole Community, and thereby the Arblade-test as an equally heavy doctrinal category resulting from a relevant number of cases since judgment *van Wesemael* in 1979 (see footnote 32, *supra*). Hence, the Court will incorporate the application and protection of the right to strike into that legal framework and not the other way round. Putting it other way round would mean taking the right to strike as the basis; the Arblade-test would then be incorporated into that framework. Hence, the basis would be the right to strike as a fully new concept of EC law (although a fundamental right; it would still be a kind of a *Deus ex machina*). It is besides nationally variable as to final material contents. Given the overall strength of the settled case-law, such a way of converging these two doctrines seems very unlikely, indeed. If the convergence line were still unclear, it would stem - in the form stated above - from an ‘effective and consistent interpretation of the provisions of the Treaty

³⁰² See Case C-124/97 *Läärä* [1999] ECR I-6067.

³⁰³ And from the case-law referred to by *Omega Spielhallen*, paragraph 38: Case C-124/97 *Läärä* [1999] ECR I-6067, paragraph 36; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 34; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 80).

as a whole' (*Albany*, paragraph 60).³⁰⁴ I would emphasize that regarding the proportionality assessment the difference in approach does not necessarily lead to a different result, given that the yardstick in the *Arblade*-test proportionality here is the protection of workers; it covers the right to strike. Regarding the acceptability assessment in the fundamental rights doctrine, the situation at least *prima facie* looks different and at the same time inevitable. Hence, the historical evidence leads one to assume that the *prima facie* leading question will be to what extent the fundamental right to strike may restrict the freedom to provide services.

However, this does not free us from the remaining challenge, application of the 'protection facet' of the fundamental rights doctrine, i.e. the proportionality and acceptability test therein. I would emphasize that when the ECJ takes – understandably as such – the fundamental freedom (with its inherent *Arblade*-test) as the basis for the necessary convergence with the fundamental right, it does not free the Court from answering the question to what extent that *freedom* may restrict the fundamental *right* to strike without it impairing its very substance.³⁰⁵ In that sense I dare to present a model below. Obviously the old adage that a freedom is weaker than a right is not sufficient for a sustainable answer in the Community context.

Still, the convergence of the *Arblade*-test and the fundamental rights doctrine is complicated. Such a convergence, or balance-making, is in any case necessary in order to answer the concrete question on the lot of the *Laval* industrial action and boycott under Articles 49 and 50 EC. It remains to be seen to what extent all this can be condensed to a more straightforward balancing of the interests involved, having regard to all the circumstances of the case (as in *Schmidberger*, paragraph 81 et seq.).

4.10.4 Applying the Line of Argumentation

I first recall that I have considered only one aspect of the *Laval* case, namely the question of proper wages (with holiday pay as a natural corollary). Other collective agreement based restrictions on the free provision of services in Sweden, such as certain insurances or payments to a training fund, deserve a separate *in casu* assessment. Such an exercise is better suited to native (or correspondent) scholars and is finally an obligation of the courts concerned. However, regarding proper wages, I would make the further preliminary remark that the industrial actions in *Laval* seem to fulfil the ILO criteria: the trade unions defended the economic and social interests of their members. On the other hand, the actions also strived to increase considerably the wages of the Latvian workers concerned, thus affecting their economic and social interests. Both angles achieve the same result of fair competition between employers. However, falling under the economic and social interests does not in itself make any

³⁰⁴ This is what paragraph 60 of *Albany* means. The interpretation is (or, must be) effective and consistent, and not the Treaty as the English version of *Albany* suggests. This is clear on the basis of the French and other linguistic versions of *Albany*. – This aspect in a way also reveals one additional reason why the Court in *Laval* will not build up the essential of its argumentation on the basis of Article 137(5) EC but will interpret – effectively and consistently – the Treaty as a whole, taking Article 137(5) EC as one element within this holistic approach.

³⁰⁵ I am well aware that this question implies recognition by the ECJ of the right to strike as a fundamental right.

strike legitimate. The question of legitimacy is subject to a combined application of the protection of the fundamental right to strike and the criteria in the Arblade-test.

Thus, what needs to be considered next is the proportionality and acceptability assessment – as resulting from the convergence of the Arblade-test and the fundamental rights doctrine - of industrial action based on a fundamental right; with the protection of workers and impairment of the *substance* of the right to strike as the relevant yardsticks. I recall that here, too, the proportionality and acceptability assessments are concepts of EC law.³⁰⁶ However, an essential and inherent factor is that, due to the lack of detailed substantive strike law in international treaties and EC law, and in line with the lessons of case-law, especially from *Dansk Slagterier* and *Omega Spielhallen*, the proportionality and acceptability assessment takes place in a real, i.e. in a national context.

Hence, the predictable broad line of interpretation of Articles 49 and 50 EC on the one hand, and the right to strike on the other, would be as follows: in so far as an industrial action of the host state workers or trade unions strives, assessed objectively³⁰⁷ and as to its nature and expressed purpose, to protect the posted workers by improving their working conditions, it passes successfully the proportionality test.³⁰⁸ It is even the more so if the protection is intended to guarantee the posted workers the same level of benefits as that applicable – for example by virtue of a national collective agreement – to domestic workers. The situation is just easier to assess this way in cases of social dumping (*Schmutzkonkurrenz*).

In case Laval the Swedish trade unions have demanded that the wages Laval pays its Latvian posted workers should be at the standard Swedish level. According to the judgment of the Labour Court of Sweden, this first meant an hourly wage at a market level for the Great Stockholm region (some 2530 €/month). Before the Labour Court of Sweden the union announced that it required the signing of a standard substitute collective agreement which, according to the pay and negotiation rules of the national CBA, would result in an hourly wage – standard for the Great Stockholm region - of 14.70 €/h (some 2430 €/month, if applied for that period of time). However, the company, Laval, was only ready to agree to 1430 €/month.³⁰⁹ Coming back to the level of principles, as a theoretical possibility the unions could demand a wholly unrealistic level (such as double the normal level in the host state). In this situation, the pay provisions that are claimed, ostensibly for the protection of the posted workers (raising their wages etc.), might be viewed – ultimately in the eyes of the ECJ - as de facto a means of discrimination against the foreign employer and his workers. Again, the broad line of interpretation clearly is that as long as a foreign employer is treated

³⁰⁶ I recall the difference between German and EC law proportionality; see footnote 131, *supra*.

³⁰⁷ The opinions of the often exploited and misled posted workers are not relevant.

³⁰⁸ I recall how in *Commission v. Germany* something assessed as ‘normal’ within the field of wages passed the proportionality test finally without being separately and expressly tested with the formula ‘does not go beyond what is necessary’. See section 3.3.3, *supra*.

³⁰⁹ The Building Workers’ Union has contested this amount as paid in reality; during the hearing before the Labour Court of Sweden the Union asserted that, according to the Latvian collective agreement concerned, the wages were 2.10 to 3.68 €/hour, i.e. some 336 to 590 €/month; see e.g. the *krönika* (column) 5/2005 of the Union’s Chairman, Hans Tilly; <http://www.byggnads.se/byggnads/38871,38869.cs>.

equally with domestic employers, the industrial action serves – next to protecting workers - fair competition in the sense of the PWD and cannot be prohibited discrimination.³¹⁰

It is notable that the first reference question does not pose the question of claiming a so-called market wage in the circumstances concerned. By market wage I mean a wage that, depending on historical, sociological and political factors, availability of manpower, economic trends, geographic circumstances etc., is higher than that in the law or national collective agreement concerned. In Sweden this may also include a substitute agreement with the non-organized foreign or domestic employer. However, in this study I confine myself to some initial remarks – with a commitment to discuss the issue profoundly in the synthesis book of this research project. Thus, in any case, the basically minimum nature of the PWD, which is here a relevant interpretative factor, does not outlaw such a claim (i.e. a claim for a market wage). Furthermore, the EC Treaty provisions other than those on discrimination (Article 12 EC), i.e. at least Articles 2 (including ‘a harmonious, *balanced* and sustainable development of economic activities’ and ‘the raising of the standard of living’; italics added), 3 (‘a policy in the social sphere’; this is the obvious key in this particular reasoning), 4 (the principle of open *market* economy; italics added), 50(3) (principle of same conditions imposed on domestic and foreign service providers, thus employers) and 136 EC (‘...improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained...’, as also resulting from the functioning of the common market...) heavily suggest, I maintain, the conclusion that the EC Treaty does not outlaw a claim based on market wage. Besides, the issue – being also a question of restricting a fundamental right - is finally tied to the founding principles of the Union, enshrined in Article 6.1 TEU.

The nature of the action requires an assessment whether the action is peaceful and is the normal behaviour of trade unions. In this case the assessment can be kept short.

³¹⁰ Sigeman (footnote 184, p. 486-7) denotes that that the Labour Court of Sweden considered the question of market wages and expressed some doubt as to the compatibility with the Treaty of the claim concerned. However, Sigeman himself refers primarily to the protection of the host state workers: Finalarte (footnote 13, *supra*), Mazzoleni (footnote 114, *supra*), Portugaia (footnote 20, *supra*), Wolff&Müller, paragraph 40 (footnote 7, *supra*) and Commission v. Germany, paragraph 24 (footnote 149, *supra*). This protection falls within the overriding reasons justifying restrictions of the free provision of services. This aspect he reiterates on p. 490 but this time developed in the form of a question whether the protection of the host state workers justifies restrictions (like the wage claims in Laval) on the free provision of services even in a case where the wages of the posted workers are not so low that they as such would require restrictive measures in the general interest. He finds that Articles 12 and 49 EC allow this and denotes that the wage claims concerned were not discriminating but merely equalled those claimed against Swedish employers. Indirect discrimination he found possible in transaction costs (like interpretation and translation), possibly balanced by lower costs in the home state’s social security costs (the last aspect being in Sigeman’s footnote 45). Sigeman’s position regarding the posting case-law corresponds to that of the author. He does not present an argumentation regarding the right to strike/industrial action as a protected fundamental right in the EU, but essentially a reference (*ibid.*, p. 489) to the growing role of the social partners since the 1989 Community Charter of the Fundamental Social Rights of Workers. Accordingly, he does not discuss the combined application of the Arblade-test and the doctrine in allowing restrictions on the fundamental rights à la Schmidberger.

According to the judgment of the Labour Court of Sweden, some incidents of peaceful picketing have taken place around the site but nothing so serious as e.g. during the tumults in case *Commission v. France*³¹¹.

It is no secret that this interpretation line on the effect of the proportionality and acceptability assessment (taken now as abstract legal categories) is – mutatis mutandis - pretty much the same as the approach of the ECJ in *Albany*.³¹² There the ECJ protected collective agreements from EC competition rules in so far as they serve by their nature³¹³ and purpose the social objectives of the Treaty or at least in so far as they contribute directly to improving one of the working conditions, namely remuneration; paragraph 63 of *Albany*. Anyway, the ‘purpose’ and ‘nature’ of the collective agreement served as a safety valve against misuse of collective agreements. My final argument on this line is hypothetical in a formal sense but worth presenting in any case. Namely, had the case *Albany* also involved a strike, then just as in the case of an allegation of a collective agreement being incompatible with EC law due to its emergence from an illegal or disproportionate strike, that strike would probably have received the same treatment as the collective agreement resulting from such a strike.

This interpretation line would obviously be also in harmony with the outcome in case *Gustafsson v. Sweden* of the European Court of Human Rights³¹⁴ in the sense of

³¹¹ See Case C-265/95 *Commission v France* [1997] ECR I-6959.

³¹² An intermediate conclusion, applying mutatis mutandis the structure in paragraph 59 of *Albany*, would be: ‘It is beyond question that restrictions of the free movement of services are inherent in collective actions taken by workers and their organisations. However, the social policy objectives pursued by such action would be seriously undermined if workers and their organisations were subject to Articles 49 and 50 of the Treaty when seeking to improve conditions of work and employment.’ A further corresponding exercise with paragraph 60 of *Albany* would result in stating that ‘It therefore follows from an effective and consistent interpretation of the provisions of the Treaty as a whole and the fundamental right to take collective action in accordance with the ILO Constitution and Conventions Nos. 87 and 98 that the action in pursuit of such objectives must, by virtue of its nature and purpose, be regarded as falling outside the scope of Articles 49 and 50 of the Treaty.’ This kind of reasoning includes no real proportionality test as in the *Arblade*-test and *Schmidberger* doctrine. The purpose test may, however, serve a similar function. Hence, a genuine purpose of improving working conditions would equate to regarding something as a proportionate means.

³¹³ ‘Nature’ of the agreement in *Albany* meant that it was made in the form of a collective agreement and was the outcome of collective negotiations between representative organisations of employers and workers (according to the French version; the English one used ‘representing’ instead of ‘representative’); see paragraph 62 of *Albany*.

³¹⁴ See Case *Gustafsson v. Sweden* (1996) 22 EHRR 409. In assessing the boycott and related activities of the national trade union, striving to a substitute agreement, the EHRC reasoned (in paragraph 53), as follows: ‘Bearing in mind the special role and importance of collective agreements in the regulation of labour relations in Sweden, the Court sees no reason to doubt that the union action pursued legitimate interests consistent with Article 11 (art. 11) of the Convention (see, for instance, the above-mentioned *Swedish Engine Drivers' Union* judgment, pp. 15-16, para. 40; and the *Schmidt and Dahlström v. Sweden* judgment of 6 February 1976, Series A no. 21, p. 16, para. 36). It should also be recalled in this context that the legitimate character of collective bargaining is recognised by a number of international instruments, in particular Article 6 of the European Social Charter, Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights and Conventions nos. 87 and 98 of the International Labour Organisation (the first concerning freedom of association and

respecting the national margin of appreciation regarding the right to collective action. The difference is, by definition, that there is no fundamental freedom to provide services in the ECHR, with the necessary balancing between the fundamental freedom and right. The interpretation line above would also be in harmony with the overall line of developments in the history of the Community: the emergence of a real social dimension, particularly in the context of fundamental or human rights. In gender equality the Court in *Deutsche Post* and in *Deutsche Telekom* in 2000 found it inevitable to conclude that ‘the economic aim pursued by Article 119 [now 141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.’³¹⁵ According to Judge Rosas, ‘[t]his quotation from the Court’s case law shows that the social dimension of the EU has come to be considered as a value in itself, not necessarily subordinate to the economic freedoms inherent in the EC Treaty.’³¹⁶ The right to strike/industrial action is also, as to its core, a fundamental human right, deserving equal treatment.

What would finally be the effect of the proportionality and acceptability assessment, as shaped above, under Articles 49 and 50 EC? It is – nothing more, nothing less than - a safety valve, as also indicated in judgment *Commission v. Germany* (explored in section 3.3, *supra*). I am, of course, well aware that this interpretation line is in discordance with the old trade union slogan that the ECJ may assess and judge the results of a strike, notably a collective agreement, but not the strike itself. The counterargument is that an advanced trade union doctrine should orientate itself by taking into account probable developments (based on history) and not solely according to its own dogma. Similarly, a complete ‘hands off’ solution by the ECJ would doubtless require the right to strike to be an absolute fundamental right, but it is proportional or subject to possible restrictions in all the international treaties.

To sum up: in assessing the industrial action in the *Laval* (Vaxholm) case the ECJ will judge (in more or less detail), in this era of globalisation, the first direct case in EC strike law. This is connected – not just by the case itself questioning the Danish-Swedish labour market model but also by the ILO context (ultimately with its

the right to organise and the second the application of the principles of the right to organise and to bargain collectively).’ In paragraph 54 the Court, based on the margin of appreciation accorded to the States, drew its conclusion that Sweden did not fail to secure the applicant’s rights under Article 11 (art. 11) of the Convention.

³¹⁵ Joined cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 57. The ECJ first (in paragraph 55) referred to Case 43/75 *Defrenne v Sabena* [1976] ECR 455 (*Defrenne II*), where the fundamental right aspect was not yet present; shoving the change in the approach it then (in paragraph 56) referred to cases 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 26 and 27; joined cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, paragraph 16; and case C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143, paragraph 19, where the Court had found that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure. The precedence of the social aim was stated ‘in view of that case law’. Case C-50/96 *Deutsche Telekom* [2000] ECR I-743 includes the passages identical to those in *Deutsche Post*.

³¹⁶ See Allan Rosas, *The Role of the European Court of Justice in the Application and Interpretation of Social Values and Rights*, in Palola Elina and Savio Annikki (eds.), *Refining the Social Dimension in an Enlarged EU, Stakes*, Helsinki 2005, p. 199.

coherence argument) within the fundamental rights doctrine - to the Social Self of the Community. A legitimate and reasonable expectation is that the forthcoming judgment will strongly resemble *Albany*. This background note may be further turned to a sustainable outcome by resorting to one of the fundamental principles in EC law: non-discrimination. Such a decision line would guarantee the protection of the fundamental right to strike in EC law but make it possible to grasp any abuse of that right.

4.10.5 Reach of Case *Laval*; Case *Viking v. ITF and FSU*

In *Laval* the ECJ *prima facie* will have to lay down the essential principles concerning the right to strike in EC law. The situation resembles that in *Albany* in the sense of filling a decades' gap in case-law, as a heavy spill-over phenomenon. The internal market sometimes produces after a long delay, but anyway it eventually produces, new legal clashes between the economic market freedoms and (fundamental) social rights. The decision in *Laval* will be of constitutional value, shaping the overall balance between economic and social factors in the EU in its very core, i.e. the Internal Market.

Besides, a first successor case to *Laval* in the form of another reference for a preliminary ruling is already before the Court of Justice. Namely, on 16 June 2005 the High Court (of London), Queen's Bench Division, Commercial Court in case *Viking Line Abp v. The International Transport Workers' Federation (ITF) and the Finnish Seamen's Union (FSU)* granted an injunction against any industrial action, even against these defendants causing such an action by other trade unions, related to wages applicable to seamen after the re-flagging of MS Rosella in Estonia (at present it flies the Finnish flag).³¹⁷ The aim was to replace the existing, predominantly Finnish crew by an Estonian one, however, retaining some Finnish (key) workers onboard. With respect to the actions of the FSU, the court naturally applied the Finnish law on industrial action (on the assumption that it would allow such an injunction; see *infra*). The court *de facto* ignored the application of the maritime services rules in EC law³¹⁸ and its judgment was based on Article 43 EC and

³¹⁷ Decision [2005] EWHC 1222 (Comm) of the High Court.

³¹⁸ Judgment (of the Court in plenum) in case C-18/93 *Corsica Ferries Italia* [1994] ECR I-1783, paras. 20 to 31, shows the overall status of service rules of the EC Treaty in the field of maritime transport. They apply. On that line in case C-381/93 *Commission v. France* [1994] ECR I-5145, paragraph 13, the ECJ then declared that Maritime Transport Services Regulation No 4055/86/EEC (the English version as a lapsus refers to 'Paragraph 13' of Regulation 4055/86; there are 12 Articles in the Regulation) thus renders applicable to the sphere of maritime transport between Member States the 'totality of the Treaty rules governing the freedom to provide services.' This *a priori* means that the *Arblade*-test (see section 1.2.3) applies there while it is not for this reasoning to discuss its possible minor modifications or specifications due to specific circumstances in maritime transport. To denote in brief, vulnerable seamen need special protection like construction workers (see *Arblade*, paragraph 36, *in fine*; section 1.2.3, *supra*). Furthermore, much of my reasoning above, especially in Chapter IV, is also *mutatis mutandis* valid in case *Viking v ITF and FSU*. Furthermore, my examples on the application of the proportionality principle in sections 2.2.5 and 3.3.3, *in fine*, are also relevant in the context of the case *Viking v ITF and FSU*. Finally, as to case C-18/93 *Corsica Ferries Italia*, the Advocate General, who reasoned fully on the line of the Court, also relied (paragraph 23 of the opinion of 9 February 1994) (although via

equipped with a penal notice against possible contempt of Court. It was further strengthened by a threatened sequestration of the defendants' assets. The judgment became subject to appeal, not just in the United Kingdom, but also in Finland where it was to be enforced against the FSU.³¹⁹

The appeal in the United Kingdom led on 3 November 2005 to the judgement of the Court of Appeal (Civil Division).³²⁰ In this instance Viking's Estonian subsidiary, Viking Line Eesti OÜ, joined the proceedings and claimed to reconfirm the injunction by invoking its freedom to engage in liner traffic (provision of maritime transport services) between Estonia and Finland under Regulation 4055/86/EEC.³²¹ In its judgement the Court of Appeal lifted the permanent injunction issued by the High Court and (also refusing any interim injunction) referred to the ECJ ten questions (with some of them elaborated by further alternatives). The first one asks whether the industrial action falls 'outside the scope of Article 43 of the EC Treaty and/or Regulation 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in [...] *Albany*, paras 52-64?' This is what I have discussed in sections 4.9.1 and 4.10.4, *supra*. – In the ECJ the case has the following coordinates: C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union*.

The other questions deal with the horizontal direct effect of establishment and services rules in EC law, existence of restrictions on free movement, relationship of establishment and services rules³²² and justification of restrictions. The last

case 13/83, *European Parliament v Council* [1985] ECR 1513, paragraph 64) on the first 'great' labour law judgment within the free provision of services, namely Case 279/80 *Webb* [1981] ECR 3305 that also started the case-law cited in the present cornerstone of social or labour law restrictions on the free provision of services: *Arblade*, paragraph 36.

³¹⁹ According to Article 34 in the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Member States may refuse to recognise a foreign judgment if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought. In its appeal of 30 August 2005 against the recognition by a district court the FSU invoked *ordre public*, based in particular on the constitutional protection of the right to strike (and i.a. that of industrial peace and dispute settlement system, and of freedom of association and freedom of expression) in national law, but it also referred to Finland's obligations in the ILO and, consequently, to Article 307 EC.

³²⁰ The judgment is available on the internet:

<http://www.bailii.org/ew/cases/EWCA/Civ/2005/1299.html>.

³²¹ The original lawsuit was based – exactly in this order – on the envisaged industrial action violating EC rules on 1. free provision of services, 2. free movement of workers and 3. freedom of establishment. During the proceedings in the High Court services and establishment exchanged their 'benches'.

³²² Case-law shows a sufficiently settled line of reasoning by the ECJ in assessing rivalling or overlapping internal market freedoms in a particular case. In *Omega Spielhallen* (footnote 208, *supra*) the ECJ stated this, as follows (paragraph 26): '...where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it...' The Court referred i.a. to the lottery case C-275/92 *Schindler* [1994] ECR I-1039 where the full Court found that cross-border sending of advertisements and application forms, and possible ticket selling, thus importation and

mentioned facet includes i.a. the assertion that ‘the taking of collective action (including strike action) is a fundamental right protected by Community law’ and the concept of the protection of workers as a justification ground; question No. 7. A separate question (No. 8) deals with the justification of the flag of convenience policy of the International Transport Workers’ Federation. Thus, via the link to the ILO right to strike/industrial action even the possibility of striving after global social justice will be indirectly addressed in this case. Regarding the justification of the FSU’s action, the Court of Appeal finally asks whether the collective action that has been taken strikes ‘a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition’; question 9. This is what I have discussed under the Arblade-test *passim* in this study when considering strikes/industrial action, in particular in section 4.10.

Time and space do not allow any in depth reasoning on the legal and economic details in *Viking*.³²³ As *Laval*, it deals with the fundamental and constitutional balance

distribution of such objects, were, in the context of lottery activities, not ends in themselves. The case was decided only by applying the rules on free movement of services; paragraphs 22 to 25. On the line of this ‘dominating freedom principle’ in the particular circumstances of the case *Viking* the re-flagging in a certain Member State is not an end in itself. The core is the pay conditions (and the way to establish them – with or without the right to strike - before or after re-flagging) which falls under the free provision of services; see further footnote 318, *supra*. It is essential to note that under the Maritime Services Regulation 4055/86/EEC the right to liner traffic is not bound to flagging in one of the two states; flagging within the Community suffices; see Articles 1(1) and 1(2). Besides, ‘triangle traffic’ (e.g. Tallinn-Stockholm-Helsinki) might also emerge.

³²³ However, some aspects concerning free movement in judgments under EC Regulation 44/2001 are noteworthy already here. The background is that in *Viking* the courts in United Kingdom applied Finnish law to the action of the FSU. On the other hand, the High Court (like the Court of Appeal in United Kingdom, naturally) was undoubtedly a competent court under Article 6(1) of the Regulation because the other defendant, ITF, has its base in London. In its public policy (ordre public) appeal (see footnote 319, *supra*) in Finland the FSU, although in a footnote, also referred as a ground to case C-38/98 *Renault v. Maxicar and Formento* [2000] ECR I-2973.

Case *Renault* concerned intellectual property rights granted in France. The defendants opposed in Italy the recognition of the judgment of the French Cour de Cassation (Court of Cassation) which then led to this preliminary ruling of the ECJ. The defendants attacked the French intellectual property rights (which were not recognised in Italian law) and wished the ECJ to define the concept of public policy in economic matters (ordre public économique); paragraph 24 of the judgment. Thus, the defendants invoked free movement of goods and spiced their attack with the allegation that the French courts would have committed an error in applying free movement rules. The clue in the ECJ’s reasoning then came in paragraph 32, second sentence, where it wrote, as follows: ‘The fact that the alleged error concerns rules of Community law does not alter the conditions for being able to rely on the clause on public policy. It is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by Community law.’ The second sentence was in line (but broader) with what the Advocate General had stated (paragraph 67 of the opinion); i.e. that ‘Nevertheless, it cannot be completely ruled out that because of such an erroneous interpretation the enforcement of the judgment could breach fundamental principles, including those of Community law. This is however, in the situation described, only conceivable in the most exceptional of cases. There would have to be a clear violation of fundamental principles.’

between the economic and social factors within the now enlarged Internal Market. Therefore, the issue is of great political importance for the development of the European *Union*. It also encourages new thinking on ways and means of trying to accelerate, if possible, the necessary bridging of the (in general terms) drastic gap in wages, costs and overall standard of living between the ‘old’ and ‘new’ Member States. I will leave aside this macro-level consideration in this study and only pick up two legal aspects that it is worth reminding the European legal audience of (even in brief). The first concerns the contents of the Finnish strike/industrial action law regarding its relationship to the fundamental market freedoms. The second is the link that the Posted Workers Directive forms between the cases *Laval* and *Viking*.

Thus, first, in *Viking* it is important, also in the context of EC law, that the Court of Appeal first confirmed the envisaged industrial action of the FSU as lawful under national law, ‘by virtue of the right to freedom of association protected by Article 13 of the Finnish constitution’; paragraph 26 i) of the judgement.³²⁴ Moving on then, the relationship between national and EC law reveals a serious misunderstanding (wherever its final roots are) regarding this relationship as seen from the viewpoint of the Finnish Supreme Court (KKO). Namely, a crucial point in the whole reasoning of the judge of the High Court was the assertion that the constitutionally protected right to strike in Finland could not be invoked ‘where the strike is *in breach* of EC law

A further essential aspect is that the judgment (according to a combined reading of especially its paragraphs 24, 30, 32 and 34) de facto includes a recognition of the French intellectual property rights as capable of restricting the free movement of goods (in this case vehicle body parts). Thus, the ECJ rejected the idea of a European public policy (*ordre public*) based on unlimited free movement of goods (and fully free competition). In addition to the author, at least Hélène Gaudemet-Tallon has explained the judgment on this line in her case annotation: *Revue critique de droit international privé*, No 3, juillet-septembre 2000 p. 504-513. She refers to violation of primacy of EC law as an example of a situation where EC law would undoubtedly form the contents of the public policy under regulation 44/2001 (p. 512). It is difficult to describe this with terms other than European public policy (within the limits and general conditions of the Regulation 44/2001, of course).

Following the judgment of the British Court of Appeal in *Viking* the appeal of the FSU in Finland became superfluous. I therefore pass over here any further reasoning on judgment *Renault*.

In the application of Regulation 44/2001 there is – due to Article 68(1) EC - the anomaly that only a national last (or single) instance can refer questions for a preliminary ruling of the ECJ. See the orders in cases C-24/02 Marseille Fret, paragraphs 14 and 15, and C-555/03 Warbecq, paragraphs 13 to 15.

³²⁴ The courts in the United Kingdom were able to avail themselves of the Expert Opinion of Professor Niklas Bruun of 24 November 2004, also including a discussion of the constitutional protection of the right to strike in Finland (paragraphs 32 to 47) and the relevant references to the Supreme Court’s case-law. The Opinion answered the questions posed by the High Court. The Opinion was complemented (Exhibit 1) by Niklas Bruun’s annotation and analysis of the judgment in the Case Estonian Shipping Company v. Finnish Seamen’s Union and Finnish Transport Workers’ Union, *Korkein oikeus* (the Supreme Court of Finland) 2000:94 concerning MV *Rakvere*; see Finland, in *International Labour Law Reports*, Vol. 20, Kluwer Law International 2001, pp. 325-336. - The highest official authority in interpreting the Finnish Constitution, the Constitutional Law Committee of the Parliament, stated in its Opinion (*mietintö*) 12/2003 that the right to industrial action derives from the freedom of association, enshrined in Section 13(2) of the Constitution. Limitations of that right must reflect the overall limitation grounds of the fundamental rights.

directly applicable between the parties' (paragraph 67 of the judgment; emphasis added here). The Court of Appeal reiterated the same position in its paragraph 26 iv) c) but did not follow thereafter the line of reasoning of the High Court. The High Court's assertion was based on the judgement of the KKO in the *Rakvere* case³²⁵ where it dealt with – and rejected – an in principle similar injunction claimed against the FSU. The union had claimed to raise (up to a viable Baltic Sea level) the wages of the Estonian crew onboard the Estonian vessel. In its judgment the KKO in reality confirmed, leaving aside now an action exceptionally being *contra bonos mores*³²⁶ in the sense of its relevant case-law, that

“it would be possible to forbid the industrial action measures taken by the Seamen's Union primarily in a case where the use of such measures has been *specifically* restricted through national legislation or in European Community law in such a way as to allow reference to it when dealing with relations between private parties.” (italics added)³²⁷

To prove the difference between an interpretation-based 'being in breach' and an *express* norm empowering a judge to restrict the use of a constitutionally protected right does not require any lengthy reasoning. By analogy one may state that exceeding in a car a speed limit (of let's say 40 kilometres/h) by a (more or less reliably) measured one kilometre per hour means 'being in breach' of that limit. However, every layman knows that in each Member State there are other statutes so as to empower a provisional withdrawal (like an interim injunction) or even cancellation (like a permanent injunction) of the driving licence. It is crucial here, of course, that there is no such restricting statute regarding any industrial action, neither in national nor in EC law, neither *express/specific* nor reachable via any meaningful/fair interpretation of law.

Secondly, the link between *Viking* and *Laval* brings us back, first, to the contents of the Posted Workers Directive, in particular to its Article 1(2) according to which

‘This Directive shall not apply to merchant navy undertakings as regards seagoing personnel.’

Textually this clause is clear. The PWD does not apply to merchant navy undertakings as regards seagoing personnel. Contextually this clause may lead to diametrically opposite conclusions as to the protection granted to seagoing personnel by EC law. Namely, at least in the Court of Appeal the company Viking maintained that this clause would be the very clause where

³²⁵ The judgment referred to in the previous footnote.

³²⁶ For the actions *contra bonos mores* (fair practices), see Bruun's Expert Opinion, footnote 324, *supra*, paragraphs 60 to 74. The opinion shows that *contra bonos mores* is not relevant in Viking; there is, besides, no such allegation while the company Viking recognises that the envisaged action of the FSU would be lawful under national law.

³²⁷ This formula is quoted from the High Court's judgment, paragraph 66. The translation substantively corresponds in full to that e.g. in Bruun's article in the Fordham reports, footnote 324, *supra*, p. 331; a purely semantic difference is that the latter uses the expression 'use of such action has been *expressly* restricted' (italics added) instead of 'use of such measures has been *specifically* restricted'.

‘...the Community legislature expressly recognised that the principles set down in [the relevant posting] case-law were not appropriate for seafarers,...’.
328

Concerning the principal position of seagoing personnel, it is elementary, as to relevant case-law, first, to see that it also includes the ‘early’ judgments *van Waesemael*, *Webb* and, in particular, *Seco* where the Court confirmed that the Member States are not required to tolerate low-wage or dumping competition within the field of the free provision of services. Furthermore, in addition to *Rush Portuguesa* and *Vander Elst*, *Arblade* is especially relevant here, too.³²⁹ Second, the relevant case-law interprets the EC Treaty. Nothing in the Treaty even hints that it would allow lower protection standards for seagoing personnel (i.e. finally the right to industrial action/strike in this particular case) than those for other professions.³³⁰ Third, as I have shown in my Chapter I, the PWD, as a political confirmation by the European legislature of the interpretation of Community law (established in *Seco*), applies, as does any secondary EC legislation, in the framework of the EC Treaty. Secondary legislation cannot overrule the leading principles of the EC Treaty. Hence, the PWD could not have validly excluded the seagoing personnel from the protection granted by the EC Treaty, as interpreted by the Court. Another issue is that the wide use of secondary ship registers made it politically impossible to cover seagoing personnel by the PWD because that would have been in contradiction with the specific obligation established by the PWD: if there are binding national minimum wages, they must apply to posted foreign workers, as well.

The conclusion is that the PWD was not intended to cancel and cannot cancel the protection of seafarers under the EC Treaty. The relevant case-law since *Seco* must apply to them, too. Logically, indeed, in assessing the justification of seafarers’ or their organisations’ industrial action and of the flag of convenience policy of the ITF, the relevant conclusion is that the fundamental rights doctrine (*Schmidberger*, paragraphs 78 to 81 et seq.) and the protection of workers doctrine (*Arblade*, paragraph 36) form the basic legal framework for such action and policy. Finally, not even the company Viking Line has maintained that seafarers are not covered by the ILO right to strike/industrial action. Leaving aside the army and police force (like judges and high officers in the administration, representing the public employer or the so-called essential services *sensu stricto*), it is a universal right, indeed.

³²⁸ Skeleton Argument of the Respondent of 26 August 2005, paragraph 76(b); it referred to para. 138(iv) of the High Court that, always assessing the case under the freedom of establishment, mentioned judgments *Guiot*, *Rush Portuguesa* and C-288/89 *Gouda* [1991] ECR I-6836 concerning the principle of mutual recognition. I recall that its real context in this case is a claim for more money within the free provision of services; see footnote 322, *supra*. A pecuniary claim *viz-à-viz* mutual recognition is quite straightforward to shape: claiming higher wages (i.e. *more* money) does not violate the principle of mutual recognition.

³²⁹ For *Seco*, see section 1.2.2, and for *Arblade* section 1.2.3, *supra*.

³³⁰ See that judgment in joined cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR Page I-887 did not mean any such recognition. The judgment concerned the application of state aid rules and Article 117 EEC (now Articles 136 and 137 EC). It recognised that the Member States were (are) free (from the viewpoint of the Community) to set up in their *national* law a secondary (or ‘international’) shipping register that includes wages varying based on nationality (paragraph 28). The Community does not have a second/double shipping register.

Finally, a relevant procedural remark is that, because *Viking* is an injunction case, the ECJ will entertain a request that the case be given priority (pursuant to Article 55 of the Rules of Procedure of the ECJ). Thus, judgment in *Viking* may come first or judgments in *Viking* and *Laval* may come on the same day. An educated guess is that the Court will not join the cases although they both fall under the free provision of services. Namely, some different items also exist, such as *lex Britannia* only in *Laval* and the ITF's FOG-policy in *Viking*.

The current position is that the company Viking Line and the FSU have reached, after the interim decision of the Court of Appeal in United Kingdom, a manning agreement until 2008, the vessel as a consequence continuing to fly the Finnish flag but with slightly reduced wage supplements for new crew members. The principal legal dispute remained untouched in that agreement.

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The Third Article
of the Doctoral Dissertation
‘From Internal Market Regulation to European Labour Law’

**On the Social Dimension in the Context of EC Competition
Law**

**Reasoning on *Albany*,
Article 86(2) EC
and
the Finnish Earnings-Related Pension Scheme TEL under Article 86(2)**

Jari Hellsten (ML)
Hanken School of Economics
Helsinki, Finland

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Table of Contents

Index	II
Tiivistelmä	IV
Sammandrag	V
Publisher's Note	VI
Foreword	VII
Abstract	1
Introduction	2
Chapter I	
Labour Law vis-à-vis Competition Rules	4
1.1 General Remarks	4
1.2 Is There a General Exception for the Social Field?	5
1.2.1 Cases <i>Höfner</i> and <i>Job Centre</i>	5
1.2.2 Case <i>Sodemare</i>	7
1.2.3 Case <i>Becu</i>	7
1.2.4 Equal Pay	8
1.2.5 Concluding Remarks	9
1.3 Immunity of Collective Labour Agreements vis-à-vis Competition Rules	10
1.3.1 Evju's Assessment on <i>Albany</i>	13
1.3.2 De Vos' Criticism	16
1.3.2.1 The Pre- <i>Albany</i> Analysis of De Vos	16
1.3.2.2 The Principal <i>Albany</i> -Criticism of De Vos	19
1.3.3 Ichino's Assessment on <i>Albany</i>	23
1.3.4 Kiikeri's Analysis on Collective Agreements and Competition Law	25
1.3.5 Concluding and Post-Amsterdam Comments	28
Chapter II	
Social Services of General Interest; Article 86(2) EC	37
2.1 General remarks	37
2.2 Economic Activities and Undertaking	37
2.3 Case <i>AOK Bundesverband</i>	39
2.3.1 Some <i>AOK</i> Debate	41
2.4 Case <i>FENIN</i>	46
2.5 Article 86(2) EC	47
2.5.1 General Remarks	47
2.5.2 <i>Albany</i> : Particular Social Task of General Interest	50
2.5.3 Linguistic Aspect	51
2.5.4 Contextual Explanation	53
2.5.5 Origin of 'Particular Social Task' and 'Social Policy Instrument'	54
2.5.6 Meaning of the Court's Normative Assertion	55
2.5.7 <i>Commission v. Spain</i>	59
2.5.8 Concluding Remarks	60
2.6 The Finnish Statutory Earnings-Related Pension Scheme (TEL)	
vis-à-vis EC Competition Rules	64
2.6.1 Background	64
2.6.2 Major Agreements of Social Partners	66
2.6.3 Agreements on Contributions and Technical Interest Rate 'TIR'	67
2.6.3.1 Contributions	67
2.6.3.2 Technical Interest Rate TIR	68
2.6.4 Procedure Regarding Contributions and TIR	70
2.6.5 Elaborating Remarks on TEL in a European Context	70
2.6.6 Justification of TEL in EC Law	71
2.6.6.1 General Remarks	71
2.6.6.2 TEL Scheme and Albany-Immunity	72

2.7 Justification of TEL under Article 86(2) EC	75
2.7.1 General Conditions under Article 86(2) EC	76
2.7.2 Case <i>AOK Bundesverband</i> Once Again	79
2.7.3 Contributions and Technical Interest Rate (TIR) Agreements under the Obstruction Criterion of Article 86(2) EC; Concluding Remarks	80
2.8. Summary of Chapter II	82
Bibliography	85

Tiivistelmä

Tämän tutkimuksen ensimmäinen luku käsittelee työehtosopimusten ja EU:n kilpailusääntöjen suhdetta Albany-tuomiossa vahvistetun työehtosopimusten immuniteetin valossa. Käsittelemäni myös oikeustieteellistä kirjallisuutta. Evju, De Vos, Ichino ja Kiikeri ovat kaikki käsitelleet tuomiota artikkeleissaan. Kirjoittaja käsittelee kriittisesti näitä artikkeleita ensimmäisessä luvussa.

Amsterdamin sopimuksen jälkeinen, *Albanyyn* liittyvä kysymys on, olisiko EYT vastaavanlaisessa tapauksessa pakotettu ottamaan kantaa oikeuteen työehtosopimusneuvotteluihin perusoikeutena, ottaen erityisesti huomioon EY 136 artiklan viittaukset Euroopan sosiaaliseen peruskirjaan ja työntekijöiden sosiaalisia oikeuksia koskevaan yhteisön peruskirjaan. Artikkelissa päädytään siihen, että Euroopan sosiaalisen peruskirjan 5 artiklaan ja ILO:n peruskirjaan sekä yleissopimukseen nro 87 sisältyvä oikeus työehtosopimusneuvotteluihin on yhteisöoikeuden suojaama perusoikeus, lopulta EY 307.1 artiklan ja yleisen kansainvälisen oikeuden sitovuuden nojalla. Myös itse Albany-tuomio johtaa pitämään oikeutta työehtosopimusneuvotteluihin tosiasiallisena perusoikeutena.

Tutkimuksen toinen luku käsittelee *Albany*n perusteluja hollantilaisen eläkerahaston julkista palvelutehtävää koskevalta osalta. Perustelujen yksityiskohdat oikeuttavat päättämään, että EYT vahvisti erityisen, yleisen sosiaalisen palvelutehtävän niiden joukossa, jotka katsotaan mahdolliseksi oikeuttaa EY 86.2 artiklan alla. Samalla EYT totesi, että jäsenvaltioiden sosiaalipolitiikan välineet voivat tulla hyväksytyiksi 86.2 artiklan alla kyseisten erityisten sosiaalisten palvelutehtävien suorittamiseksi. Sosiaalipolitiikan välineen käsitteen alkuperä on julkisasiamiehen ratkaisuehdotuksessa *Albanyssa* yhdessä Saksan tietoisopista löytyvän jäljen kanssa. Käsite ylittää 86.2 artiklan kielellisen ja poikkeussäännökseen liittyvän ahtaan tulkinnan rajat. Taloudellisten toimintojen perinteisesti laaja tulkinta tasapainottuu sisällytettäessä 'sosiaalinen' palvelutehtävä nimenomaisesti artiklan 86.2 piiriin. Näin tämä käsite myös selventää erilaisten sosiaaliturvajärjestelmien asemaa artiklan 86.2 alla.

Toinen luku käsittelee myös Suomen TEL-järjestelmää artiklan 86.2 valossa. Vain työmarkkinaosapuolten rahoittama, kuitenkin lakisääteinen järjestelmä perustuu osittaiseen rahastointiin ja muuten ns. jakojärjestelmään. Yksityiset vakuutusyhtiöt pääosin hallinnoivat järjestelmää, joskin laajan julkisen kontrollin alaisina. Järjestelmä sisältää kilpailuelementtejä (eläkemaksujen asiakashyvitykset) mutta myös sen välttämättömiä rajoituksia eläkemaksuissa ja yhtenäisessä laskuperustekorossa. Näissä sopimuksissa on varteenotettavia työmarkkinasopimusten piirteitä. Näillä perusteilla, ja osittain nojautuen tuomion *AOK Bundesverband* perusteluihin (tietty kilpailuelementti ei välttämättä muuta sosiaaliturvajärjestelmää luonteeltaan ei-sosiaaliseksi) tekijä vetää johtopäätöksen, että eläkemaksuja ja laskuperustekorkoa koskevat sopimukset TEL-järjestelmässä katsotaan oikeutetuiksi artiklan 86.2 nojalla.

Sammandrag

Första kapitlet i denna studie behandlar förhållandet mellan kollektivavtal och EG:s konkurrensregler i ljuset av den i domen *Albany* bekräftade immuniteten av kollektivavtal. Också rättsvetenskaplig litteratur behandlas. Evju, De Vos och Ichino, har alla behandlat domen i skilda artiklar. Författaren gör i detta kapitel en kritisk granskning av dessa artiklar.

En *Albany*-relaterad fråga efter Amsterdamfördragets tillkomst är om EGD skulle i ett motsvarande fall skulle ta ställning till rätten till kollektiva förhandlingar som en grundläggande rättighet skyddad av EG-rätten, speciellt när man beaktar hänvisningarna i artikel 136 EG till den europeiska sociala stadgan och gemenskapsstadgan om arbetstagares grundläggande sociala rättigheter. Författaren svarar på det här så att rätten till kollektiva förhandlingar, inkluderad i artikel 5 i den europeiska sociala stadgan samt i ILOs stadga och konvention nr 87, är en grundläggande rättighet i EG-rätten, sist och slutligen på grund av artikel 307.1 EG och den generella internationella rätten. Också själva domen *Albany* ger anledning till att hävda att rätten till kollektiva förhandlingar är en grundläggande rättighet.

Andra kapitlet i studien utnyttjar resonemanget i *Albany* vad gäller den holländska pensionsfondens generella service uppgift. En tolkning av domen motiverar att konkludera att domstolen etablerade en speciell social uppgift av allmänt intresse under artikel 86.2 EG. Samtidigt skrev domstolen ut att medlemstaternas socialpolitiska instrument i tillhandahållandet av sådana offentliga tjänster kan rättfärdigas under artikel 86.2. Begreppet 'socialpolitiska instrument' är hämtat från generaladvokatens förslag till avgörandet i *Albany* samt den tyska doktrinen. Begreppet går utanför ordalydelsen och den traditionella snäva tolkningen av artikel 86.2. Den breda tolkningen av 'ekonomiska aktiviteter' balanseras av det här uttryckliga inlemmandet av den sociala uppgiften inom artikel 86.2. Detta klargör vidare positionen av olika sociala skyddssystem under artikel 86.2.

Andra kapitlet diskuterar också det finländska arbetspensionssystemet APL under artikel 86.2. Systemet fungerar som partiellt fonderat och i övrigt enligt fördelningsprincipen. Det finansieras av arbetsmarknadsparterna. Förmånerna är helt lagbaserade. De privata försäkringsbolagen sköter systemet till största delen men under omfattande statlig kontroll. Systemet innehåller konkurrenselement (premieåterbäringarna), men också nödvändiga restriktioner via avtal om pensionsavgifter och beräkningsgrundsräntan som tillämpas i hela systemet. Dessa avtal ikläder sig relevanta drag som kännetecknar kollektivavtal. Med dessa grunder, och delvis baserat på resonemanget i domen *AOK Bundesverband* (en viss andel konkurrens förändrar inte nödvändigtvis ett socialt trygghetssystem som icke-socialt) drar författaren slutsatsen att avtalen om pensionsavgifter och beräkningsgrundsräntan i APL-systemet är motiverade enligt artikel 86.2.

Publisher's Note

The study at hand, which has been co-financed by the Ministry of Labour, deals with several topical aspects of the social dimension of EC competition law. The steering group of the study has been tripartite consisting of the representatives of the Ministry and social partners as well as academics. The researcher, Mr. Jari Hellsten, has carried out independent academic work and the views expressed in his study do not bind the Ministry of Labour or other participants in the steering group.

Helsinki, 1st November 2006

Jouni Lemola

Chairman of the Steering Group
Ministry of Labour

Foreword

This study forms the third part of the wider project “*From Internal Market Regulation to European Labour Law*”, financed by the Finnish Work Environment Fund, the Finnish Ministry of Labour and several Finnish trade union organisations. It focuses especially on the relationship between social law or the social dimension on one hand and EC competition law on the other.

Professor Niklas Bruun has acted as the project leader and research manager and Jari Hellsten is the researcher. This third report in the series of three will be followed by a synthesis report that will be published in early 2007 completing the project.

We wish to thank all the colleagues and friends who have commented on the manuscript and also helped us in different ways. It goes without saying that all responsibility for any remaining shortcomings lies with the author and his supervisor. We also wish to express our gratitude to the Finnish Ministry of Labour for publishing this report in its scientific series.

Helsinki, 27 October 2006

Niklas Bruun

Abstract

In the first Chapter of this study I discuss the relationship between collective agreements and EC competition rules, in the light of the immunity of collective agreements established in *Albany*. I further discuss the academic commentary on *Albany*. Evju, De Vos, Ichino and Kiikeri have all discussed the judgment in their articles. The author discusses these articles with a critical approach.

A post-Amsterdam question, which is linked to *Albany*, is whether the Court would be required in a corresponding case to take stock on the fundamental right to collective bargaining, given especially the references in Article 136 EC to the European Social Charter (ESC) and the Community Charter of Fundamental Social Rights. Unlike the Advocate General in *Albany*, the author answers that the right to collective bargaining, included in Article 5 ESC and in the ILO's Constitution and Convention No 87, is a fundamental right protected by EC law, finally by virtue of Article 307(1) EC and general international law. Judgment *Albany* itself also leads one to the conclusion that the right to collective bargaining is a factual fundamental right in EC law.

In the second chapter of the study I explore that part of the reasoning in *Albany* which concerned the Dutch pension scheme as a public service task. Careful reading of the judgment justifies one in concluding that the Court established a particular social task of general interest among those possible to justify under Article 86(2) EC. At the same time the Court spelled out that *social* policy instruments used by the Member States in performing such particular social tasks may qualify as justified under Article 86(2). The origin of the notion of social policy instrument under Article 86(2) appeared to be in the opinion of Advocate General in case *Albany*, together with a trace in the German doctrine. The notion surmounts the linguistic ambit and narrow reading of Article 86(2) as an exception that besides refers only to tasks of general *economic* interest. The traditionally broad reading of the concept of economic activities becomes balanced by this express insertion of a particular 'social' task of general interest in the ambit of Article 86(2). This notion further clarifies the status of various social security schemes under Article 86(2).

I also discuss in the second chapter the Finnish Earnings-Related Pension Scheme ("TEL") under Article 86(2). The scheme operates as partially funded and partially as pay-as-you-go. It is financed by the social partners, only. The benefits are fixed by law. The scheme is mainly run by mutual insurance companies under private law with extensive public control. The scheme includes elements of competition but also its necessary restrictions by agreements on the contributions and the single technical interest rate used throughout the scheme. These agreements display to a considerable degree features of collective labour agreements. Therefore, and partially based on the reasoning of judgment *AOK Bundesverband* (a certain degree of competition does not render a social security scheme non-social), the author comes to the conclusion that the agreements on contributions and the technical interest rate in the TEL scheme are justified under Article 86(2).

Introduction

This Article is the third in a wider research project ‘From Internal Market Regulation to European Labour Law’. The two earlier articles (“On Social and Economic Factors in the Developing European Labour Law” and “On the Social Dimension in Posting of Workers”) have been published in 2005 and 2006. This article shapes the Social Dimension in the context of competition rules. A synthesis article will be published later.

The first chapter of the article deals with the relationship between collective labour agreements and competition rules. As a preliminary issue it touches briefly on the question whether there is a general exception for the social field, let it be that we may presume a negative answer. As to the relationship between collective agreements and competition rules, *Albany* is the leading case. I had the opportunity of contributing to the book “Collective Agreements and Competition Law in the EU” which I co-edited with Professor Niklas Bruun and in which I wrote together with Professor Niklas Bruun the analysis of European law, i.e. including that of judgment *Albany*. It is telling how little has happened since then regarding the issue of collective agreements v. competition law. In fact there is no case-law since judgment *van der Woude* in 2000 (and the Norwegian EFTA-Court judgment *Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) v. Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities)* in 2002), and no new case is in the pipeline that I know of. The issue has, however, not lost its relevance. I therefore continue the *Albany*-debate in this article. I do not repeat, more than is necessary, anything already covered in the writings of 2001. I also take the liberty not to present any point and comment about the *Albany*-debate, but confine myself to pick up in corpus text four presentations (by Evju, De Vos, Ichino and Kiikeri; in footnotes one also finds references to Sciarra and Giubboni) that, each in its own way, represent a more or less compact description of the *Albany*-immunity. Accordingly, I do not repeat the discussion included in the first publication of this project that concerned the discussion about a priority given either to social or economic factor in *Albany* (It was given to the social factor). As an important precedent that defines the constitutional line between social and economic rights, *Albany* gives rise to interpretations by analogy, as in the pending case *The International Transport Workers’ Federation and the Finnish Seamen’s Union v. Viking Line and OÜ Viking Line Eesti* on the right to strike. However, in this article I leave these analogical interpretations aside with the exception of considering in brief a possible ‘labour law exception’. In sum, the first chapter of this article tries to update the *Albany* debate and comes in the end to the question of a possible fundamental right to collective bargaining in EC law.

The second Chapter focuses on social services of general interest and their position under Article 86(2) EC. There are three main issues.

The first issue is whether the Court in *Albany* also launched conceptual novelties under Article 86(2) EC, namely that of ‘a particular social task of general interest’ and an ‘instrument of social policy’ in fulfilling such public service tasks. That part of *Albany* has been subject to considerably less commentary, especially in English. In French I have found only one doctrinal source which deals with the general relationship between collective agreements and competition rules. On the other hand, the author is convinced that this piece of EC law merits exploration in full, especially

in English, although there is also a linguistic problem clearly hampering the understanding of this part of *Albany* in English. As a prerequisite for the *Albany* reasoning the basic notions of ‘economic activities’ and ‘undertaking’ are considered in brief, especially in the light of judgment *AOK Bundesverband*, which concerned the national sickness insurance scheme in Germany.

The second issue is the presentation of the Finnish Statutory Earnings-Related pension Scheme (TEL) which includes elements of solidarity while as a pension scheme it operates based on a partial funding and is predominantly run by mutual insurance companies under private law. The system further includes competition elements but also restrictive agreements by the pension insurance companies on the contributions and a single technical interest rate (TIR) applied throughout the scheme. In the national debate the TEL scheme is therefore often presented as if it would be a glaring and possibly unjustified exemption from competition rules. In reality, the scheme is one of the rare pension schemes (if not the single one) under the so-called first pillar of social security that includes elements of competition between the actors involved. A further source of hopefully interesting reasoning lies in the fact that there are relevant features of labour market agreements involved in fixing the amounts of contributions and technical interest rate (TIR) in this scheme.

A third and natural issue in the end is the question of the justification of the TEL scheme under Article 86(2) EC, naturally in the light of the obstruction criterion applicable. It might also be unorthodoxy to resort in this justification to judgment *AOK Bundesverband* that did not come under Article 86(2) EC because the German sickness insurance funds concerned were not deemed to be undertakings in the sense of Article 81 EC. The reason for resorting to *AOK Bundesverband* by analogy is the certain dose of competition accepted in that judgment without it changing the basic social nature of the scheme concerned. Thus, a close reading of this judgment reveals that it represents a careful assessment of a social security *system* that, so as to guarantee the general interest, may also include less attractive details (like a system of determining maximum amounts reimbursed in respect of medicinal products). It might be considered unwise by some for me to expose voluntarily the TEL scheme to a public EC competition law scrutiny. My answer is there are actors inside and outside the TEL scheme who are ready to subject it to such a scrutiny irrespective of any doctrinal writings on the subject. *

* The manuscript was substantially closed by 30 September 2006.

Chapter I

Labour Law vis-à-vis EC Competition Rules

1.1 General Remarks

In discussing the relationship between EC (and national) labour law and EC competition rules, one must first deal with questions about the limits of labour law. A preliminary point is that gender equality is a part of labour law even though in this study it receives only a marginal treatment - a mention of the principal status of gender equality in relation to competition rules. Safety and health is a typical part of labour law which has a direct link to competition. In that field a principal statement is enough: compromising safety and health shall not be used as an indirect means of competition, given that the safety and health *acquis* (Articles 2, 95(4), 136 and 137(1)(a) EC with the corresponding secondary legislation) requires a high level of protection. More generally, we may understand with labour law the body of *acquis* that takes its effect either at the individual level between an employer and his workers¹ or in the collective labour relations.

As to competition rules, I will not enter into any in-depth reasoning about their contents but will mention that their main purpose is to prohibit price and other cartels (Article 81 EC) and abuse of dominant position (Article 82 EC) as well as to limit state aid. The last mentioned includes a social dimension of its own. However, it is not developed in this article. Merger control forms a separate dimension in which a tiny social element exists in the form of two cases.

The role and status of competition rules is central for the whole Community. In judgment *ECO Swiss* the Court described them, as follows:

[A]ccording to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article [81] of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article [81(2)] of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.²

Competition rules have developed since the Treaty of Rome in 1957 and form today a legal culture of its own. They are, together with the free movement rules, fundamental to the functioning of the Internal Market.

The '*fondateurs*' of the Community were more than just in principle aware of the competition effects of labour law. A classical example is Article 141 EC (ex 119) on equal pay that France insisted be included in the EEC Treaty. The Spaak report mentioned unequal pay as well as working time, overtime and paid annual holidays as

¹ Reference to workers includes both blue and white collar workers and employees.

² Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 36.

a source for distortion of competition.³ The outcome was, certainly also based on the ILO's Equal Remuneration Convention 1951, to insert Article 119 EEC on equal pay and Article 120 EEC (now 142 EC) on maintaining 'the existing equivalence between paid holiday schemes.'⁴ However, the direct legal relationship between labour law and competition rules remained a *tabula rasa* as to express norms when establishing the Community.⁵ One incident around this relationship was when the Commission proposed certain minimum requirements for fixed-term contracts in 1990 with accentuated competition balancing grounds. The proposal remained ineffective and was withdrawn when dealing with the 2002 proposal for a directive on temporary work, which is also blocked within the Council of Ministers.⁶

1.2 Is There a General Exception for the Social Field?

1.2.1 Cases *Höfner* and *Job Centre II*

A remarkable direct conflict between labour law and competition rules arose in 1991 in the *Höfner case*.⁷ It concerned the German employment procurement monopoly (exclusive rights under Article 86(1))⁸ under *Arbeitsförderungsgesetz*. The Court stated i.a. that the monopoly was not sheltered by virtue of Articles 86(1) and 82 when

- the exclusive right extends to executive recruitment activities;
- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;
- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under

³ Spaak report: Comité Intergouvernemental Créé par la Conférence de Messine. Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères, 21 avril 1956, p. 63.

⁴ As to the insertion of the social factor (I do not use the more challenging term 'dimension') in the EEC Treaty, also see the condensed explanation in Jari Hellsten 2005, On Social and Economic Factors in the Developing European Labour Law, Swedish Institute for Working Life, Work Life in Transition 2005:11 (Hellsten 2005), section 1.1, pp. 4-10.

⁵ That labour law remained for a long time as a *tabula rasa* in relation to competition rules also became clear in the parliamentary question No 777/89, OJ C328/3, 31.12.1990. It concerned industrial accidents within the FIAT group. The question alleged in Italy poorer safety and health conditions than in other countries and invoked EC competition rules. The answer of the Commissioner, Mrs. Papandreu, terminated the treatment of the question by denoting how Article 81 and 82 in principle did not concern matters of labour law.

⁶ See the documents COM (90) 228 final (OJ C228/8) and COM (2002) 149 final.

⁷ Case C-41/90 *Höfner* [1991] ECR I-1979. Already case C-179/90 *Merci* [1991] ECR I-5889 launched a debate about the demarcation between competition and labour law. However, it concerned dock-work companies whose workers were also members of these companies. The case was often seen as showing the penetration of competition law into labour law. I will leave it aside now.

⁸ Article 86(1) reads, as follows: 'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.'

which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

- the activities in question may extend to the nationals or to the territory of other Member States.

This judgment has been interpreted as showing in general the applicability of competition rules to the social field, also by AG Jacobs in *Albany*.⁹ I would be cautious with such a general conclusion. Namely, the case concerned executive recruitment services and the judgment is effective only when the public employment agency (the state monopoly) is manifestly incapable of satisfying demand. Such recruitment often happens behind closed doors. Thus, it is not justified to maintain that the judgment reflects any overall priority given to market values over social ones (which was not the position of AG Jacobs either).

Case *Job Centre II*¹⁰ was a further milestone with a more direct link to general conditions in administrative labour law. It concerned the Italian employment agency monopoly. The Court found that a Member State which prohibits any activity as an intermediary between supply and demand in the employment market, whether as an employment agency or as an employment business, unless carried on by state offices, is in breach of Article 86(1) of the Treaty where it creates a situation in which those offices cannot avoid infringing Article 82 of the Treaty. That is the case, in particular, in the following circumstances:

- the public placement offices are manifestly unable to satisfy demand on the market for all types of activity; and
- the actual placement of employees by private companies is rendered impossible by the maintenance in force of statutory provisions under which such activities are prohibited and non-observance of that prohibition gives rise to penal and administrative sanctions; and
- the placement activities in question could extend to the nationals or to the territory of other Member States.

This was in practice a much more radical penetration of EC competition rules into the national labour law field than that in *Höfner*, although this case also applied in a situation of being 'manifestly unable to satisfy demand' on the market. The state monopoly de facto fell. No wonder that this case was included in the reasoning of AG Jacobs in *Albany* showing that there is no general exception for the social field from competition rules.

⁹ See e.g. the opinion of AG Jacobs in case C-67/96 *Albany* [1999] ECR I-5751, paragraph 127.

¹⁰ Case C-55/96 *Job Centre II* [1997] ECR I-7119.

1.2.2 Case *Sodemare*

Case *Sodemare*¹¹ dealt especially with the possibility of establishing the conditions for running an old people's home, notably that only non-profit-making companies or other bodies were entitled to do this. The Court found that

‘...as Community law stands at present, a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making’ (paragraph 32).

The Court further concluded (in the fourth ruling) that Articles 81 and 82, read in conjunction with Articles 3(g), 10 and 86 of the EC Treaty, do not apply to national rules which allow only non-profit-making private operators to participate in the running of a social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature.

As to the application of competition rules to the welfare scheme concerned, the Court - without even examining whether private non-profit-making bodies engaged in health-care activities were to be classified as undertakings - simply applied the competition rules and found that there was no agreement within the meaning of Article 81(1).¹² However, *Sodemare* in its specific way shows the applicability in principle of competition rules to the social field while it on the other hand it proves that non-profit-making is of importance in applying those rules.

1.2.3 Case *Becu*

In *Becu* non-recognised dockers were used in the port of Ghent with salaries far below those applicable according to a collective agreement that was binding *erga omnes*. The Court found that Article 86(1) EC, read in conjunction with the first paragraph of Article 12 EC and Articles 81 EC and 82 EC, must be interpreted as meaning that it does not confer on individuals the right to oppose the application of legislation of a Member State which requires them to have recourse, for the performance of dock work, exclusively to recognised dockers such as those referred to in the Belgian Law of 8 June 1972 organising dock work, and to pay those dockers ‘remuneration far in excess of the wages of their own employees or the wages which they pay to other workers’. It is notable that the Court in its ruling attributed to the wages payable to dockers not the neutral term ‘binding rates’ as in the reference question but the connotation ‘far in excess’ etc.

Again, the judgment does not show any general non-applicability of competition rules (Article 86(1)) to working conditions but convincingly shows how in this particular juxtaposition a non-conditioned precedence was given to rules fixing those working

¹¹ Case C-70/95 *Sodemare* [1997] ECR I-3395.

¹² This is stated in terms of AG Jacobs, opinion in *Albany*, paragraph 127.

conditions. In fact, the case concerned rather an extreme example of the dumping of labour in that the wages paid for the temporary workers were about a half of those fixed by the collective agreement concerned. This explains the elaboration of the wage rates in the ruling. It is also notable that the Court saw no need to resort to Article 86(2) EC as a justification of the national rules concerned.

1.2.4 Equal Pay

There is no possibility in this study of an extensive discussion on equal pay between men and women. However, some principal remarks clarify the relationship between competition values and equal pay. As the Court held in *Defrenne II*¹³ the principle of equal pay forms part of the foundations of the Community. As kicked-off by *Defrenne II*, it has been subject to considerable developments and also gained more weight at the level of the Treaty by the amendments introduced by the Treaties of Amsterdam (inserting equal treatment in Article 2 EC, mainstreaming principle in Article 3(2) EC, inserting Article 13 EC and affirmative action in paragraph 141(4) EC) and Nice (insertion of paragraph 2 into Article 13 EC on qualified majority voting regarding community incentives). These amendments anyway have not brought about any demarcation between equal pay and competition rules, which remains based on case-law and is so far limited to an appreciation of equal pay in the light of competition values. Thus, in *Deutsche Telekom v. Schröder* the Court in 2000 first noted the traditional double aim of Article 141 EC: economic and social; economic in aiming at preventing distortion of competition between employers in different Member States and social in promoting a fundamental human right. The Court then concluded, after having noted the developments in the human rights case-law since *Defrenne II*, that

‘the economic aim pursued by Article [141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right’.¹⁴

Thus, equal treatment (being based finally on Article 2 EC) is in principle superior to competition values. This explains the relationship, i.e. a hierarchy within this specific social and legal facet, between the social and economic factors on an EC constitutional level.¹⁵ Evelyn Ellis has described the quoted hierarchy passage as a

¹³ Case 43/75 *Defrenne v Sabena* [1976] ECR 455 (‘*Defrenne II*’), paragraph 12.

¹⁴ See case C-50/96 *Deutsche Telekom v Schröder* [2000] ECR I-743, paragraph 57. Its sister cases with identical reasoning were joined cases C-270/97 and C-271/97 *Deutsche Post v Sievers* [2000] ECR I-929. As to human rights case-law reflecting the developments since *Defrenne II* the Court noted in *Deutsche Telekom v Schröder* (in paragraph 56) cases 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 26 and 27, Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, paragraph 16, and Case C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143, paragraph 19).

¹⁵ Besselink has explained the judgment with a similar tuning. See case annotation in CMLRev. 38: 437-454, 2001, p. 444-5 and 454 while the author cannot sign his comment on an alleged general precedence of economic rights; p. 454. Szyszczak has found the cited passage of the Court as a ‘dramatic statement’; see Erika Szyszczak, *The New Paradigm for Social Policy: a Virtuous Circle*, CMLRev. 38: 1125-1170, 2001, p. 1155. Kenner has seen in

radical one (however I would call it unproblematic; see below) which could be of considerable utility, for example, in refuting economic arguments for the justification of indirect discrimination.¹⁶ Judge Rosas has stated how '[t]his quotation from the Court's case-law shows that the social dimension of the EU has to be considered as a value in itself, not necessarily subordinate to the economic freedoms inherent in the EC Treaty.'¹⁷

The human rights approach and superiority of social values over competition values in equal pay is of course akin to the Albany-immunity (that I discuss below), i.e. akin to an exception from competition rules, while the outcome in *Deutsche Telekom v Schröder* is as such only an 'equal pay precedence'. That the judgement, which spelt out the precedence of social, was in any case a non-problematic step in the developments of EC law is endorsed by the fact that the judgment was rendered by a chamber of three judges. Finally, it is very clear that if or when a question on the relationship between equal pay and competition rules arises in a concrete case, *Deutsche Telekom v Schröder* will be the natural point of reference.

1.2.5 Concluding Remarks

In *Albany* AG Jacobs discussed the demarcation between the social field and competition rules. He referred as support for the a priori applicability of competition rules to the social field also to the fact that there is no provision in the Treaty, as there is in the case of Article 36 regarding agriculture, that expressly excludes the application of the competition rules or makes this subject to a decision by the Council (paragraph 124). He further referred to Article 296(1)(b) with respect to trade in military equipment and to the exception of 'limited extent' in Article 86(2); paragraph 123. He also invoked case *Asjes* according to which 'where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect'.¹⁸ Thus, the approach in this air-transport case was sectoral or economic activity-based whereas social factors are present in every sector or activity. I therefore still maintain that it is more accurate to conclude that the '*fondateurs*' of the Treaty did not really discuss and define the legal relationship between the social field and competition rules. The stipulations in the EC Treaty on equal pay and paid annual holidays were of course also grounded with competition

Deutsche Post v. Schröder the Court's preparedness to re-evaluate the economic and social aims as a 'part of a wider recognition of the equivalence of the social and economic objectives of the Treaty as a whole', as well as – by shifting the paradigm from economic to social – 'a basis for a more fundamental reappraisal of the economic bias in the Court's sex equality jurisprudence'. Jeff Kenner, *EU Employment Law*. Hart Publishing 2003, p. 461-2. The author dares to denote that *Deutsche Post* declares, indeed, a precedence of the social factor in explaining the law on equal pay in general, not as an equivalence of the social and economic objectives.

¹⁶ Evelyn Ellis, *The supremacy of Community pensions equality law: a two-edged sword?* *European Law Review* 2000, vol. 25, p. 568.

¹⁷ Allan Rosas, *The Role of the European Court of Justice in the application and interpretation of social values and rights*, in Elina Palola and Annikki Savio (eds.), *Refining the Social Dimension in an Enlarged EU*, Stakes 2005, p. 199.

¹⁸ *Joined Cases 209/84 to 213/84 Ministère Public v Asjes* [1986] ECR 1425, paragraph 40.

values but they were not statutory in the sense of defining exactly the reach of competition rules.

What can be inferred from the case-law discussed above? Cases *Höfner*, *Job Centre II* and *Sodemare* show the applicability of competition rules to social field issues while the practical effect of competition rules is not to be generalised either. In *Höfner* and *Job Centre II* the effect was fettered by the concept of the public monopolies being ‘manifestly unable to satisfy demand’. In *Sodemare* the public contract arrangement and privilege of non-profit-making organisations in running an old people’s home was nonetheless accepted. *Becu* also shows the *in casu* inapplicability of competition rules. Namely, the exclusive rights of recognised dockers to perform dock work with agreement-based (*erga omnes*) wages were sheltered from the wrath of competition rules. *Deutsche Telekom v. Schröder* with its sister cases shows, by definition, the most radical non-applicability of Community competition rules although their hard core was at stake: the possible distortion of competition between undertakings established in different Member States.

Becu and *Deutsche Telekom v Schröder* clearly show a precedence given to the social factors over the economic values of the companies concerned, the latter case besides showing even paradigmatic evolution of the social dimension. The same precedence *de facto* can be seen in *Sodemare*. *Höfner* and *Job Centre II* represent the precedence of the economic factor although only in the limits of the manifest incapacity to satisfy demand in a given market.

In sum, the case-law discussed above does not as such show any general exception for the social field from EC competition rules. The ‘social field’ is as a concept too diffuse for any *such* definition. On the other hand, *Becu* and *Deutsche Telekom v Schröder*, as clear labour law cases, suggest immunity from rather than exposure to the full force of competition rules. However, it would be going too far to suggest, in the light of the still limited case-law discussed so far, more than a tailor-made approach *in casu*. This becomes once again clear in discussing the pivotal issue of the relationship between collective agreements and competition rules, subject to case *Albany*. That case gives, indeed, more substance to a possible more general ‘labour law exemption’.

1.3 Immunity of Collective Labour Agreements vis-à-vis Competition Rules

The judgment in the joined cases *Albany*, *Brentjens* and *Drijvende Bokken*¹⁹ on 21 September 1999 filled in a gap of more than forty years by defining the relationship between collective agreements and competition rules, notably Article 81 EC. All three cases dealt with a single sectoral pension fund – each running a supplementary occupational pension scheme established by a sectoral collective agreement that had been declared binding *erga omnes*. This meant that every worker in the three sectors concerned had to be affiliated to the sector’s fund unless the fund itself granted an exemption. The companies concerned wanted to dispense with the compulsory

¹⁹ See cases C-67/96 *Albany* [1999] ECR I-5751; C-115 to 117/97 *Brentjens* [1999] ECR I-6025; and C-219/97 *Drijvende Bokken* [1999] ECR I-6121.

affiliation by arranging similar or better pension benefits for a lower price outside the fund. They invoked the EC competition rules.

The judgment confirmed, on the basis of an effective and consistent interpretation of the EC Treaty as a whole, that collective agreements by virtue of their nature and purpose did not fall within the ambit of Article 81 EC.²⁰ “Nature” in this case meant the agreement resulting from negotiations of representative social partners and “purpose” meant its essence as a part of remuneration (pension rights).

On the basis of this judgment the author had the opportunity to edit and partially write the book Bruun Niklas and Hellsten Jari, *Collective Agreement and Competition Law in the EU* (Bruun & Hellsten 2001). It is not appropriate to repeat the analysis here. The same comment applies to the first publication of this research project: ‘On Social and Economic Factors in the Developing European Labour Law’ (Hellsten 2005) where I discussed the issue whether precedence in that judgment was given to competition or social values.²¹ I concluded that the judgment *de facto* meant that precedence was given to social values (factors). I claimed (and repeat) that dominance of economic values would have meant the subordination first of the collective agreements to competition rules and then the construing of a safety valve for them. The Court did the opposite by establishing with nature and purpose a safety valve for competition values.²² With the notions of nature and purpose of an agreement, the Court built up a safety valve for competition values, i.e. a method of dealing with concealed distortions of competition. Following this preliminary explanation I may now state the impact of the Albany-immunity:

- the negotiating social partners are not subject to competition rules (paragraph 59), and

²⁰ Paragraph 60 of *Albany* declared the basic immunity as follows: ‘It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.’ The French and other linguistic versions prove that ‘effective and consistent’ refers to the interpretation, not the Treaty. Thus, the English version is at least ambiguous and one cannot therefore adhere to Kenner’s statement that the language of the judgment was ‘strikingly clear’; Jeff Kenner, *EU Employment Law*, Hart Publishing 2003, p. 21. In paragraph 60 of *Albany* the versions other than the English one are strikingly clear. – For clarity’s sake I denote that Kenner clearly welcomes the outcome in *Albany*. For him it shows awareness of national sensitivities, autonomy of social partners and the ‘fine balance’ between the Community’s economic and social aims. For him, too, ‘it was to rectify the *formal* imbalance in the methods available to fulfil its economic and social objectives arising from the strictly limited social provisions in the Treaty of Rome...’. *Ibid.*

As such the promulgation of the interpretation method (effective and consistent) is obviously unique in case-law. Similar inferences are e.g. in Case 283/81 *CILFIT* [1982] ECR 3415 that operated with the interpretation ‘of the provisions of the Community law as a whole’ (paragraph 20), besides ‘regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’.

²¹ See Hellsten 2005, section 2.6, pp. 67-71.

²² *Loc.cit.*, p. 70.

- sectoral collective agreements are a priori excluded from competition rules.²³

In Bruun & Hellsten 2001 we further qualified the judgment *Albany*, as follows:

‘While the basic immunity of collective agreements is:

- established by balancing the Treaty provisions on social policy and collective agreements with an EC competition regime qualified as *fundamental*,
- expressly anchored in the basic objectives of the Community, such as harmonious and balanced development of economic activities and a high level of employment and social protection (Article 2 EC),
- based on an effective and consistent interpretation of the provisions of the Treaty as a whole,
- a bridge over a gap of 40 years in the Treaty itself, and
- a permit in this framework for the Member States to have recourse to the *erga omnes* effect of collective agreements enjoying basic immunity,

it is appropriate to call it a fundamental decision on the interpretation of the Treaty.’²⁴

²³ Bruun & Hellsten 2001, p. 53. I recall that in Bruun & Hellsten 2001 (pp. 45-46 and 55-56) we left open the interpretation of the scope of the immunity, i.e. whether ‘social policy objectives’ (paragraph 59 of *Albany*) or ‘working conditions’ (paragraph 63) define the limits of the immunity. Further case-law, thus cases C-180-184/98 *Pavlov* [2000] ECR I-6451 and C-222/98 *van der Woude* [2000] ECR I-7111, have not decided this issue. A decision thereon would obviously require a case that falls inside ‘social policy objectives’ but outside ‘working conditions’.

²⁴ Ibid., p. 54. According to Silvana Sciarra matters of symbolic or technical relevance are indicative to our book (see the previous note); Silvana Sciarra, Market Freedom and Fundamental Social Rights, in Hepple (ed.), *Social and Labour Rights in a Global Context*, Cambridge University Press 2002, p. 110. It certainly did more, i.e. presented the Albany-immunity as it stands, supplemented by the presentation of the relevant national situations. However, Silvana Sciarra clearly supports the Albany-immunity (‘...labour lawyers reading *Albany* gain reassurance from the Court’s decision exempting collective agreements from antitrust law’; *ibid.*, p. 109). She does not discuss its conditions or the Treaty interpretation leading to it (effective and consistent interpretation of the provisions of the Treaty as a whole; paragraph 60 of *Albany*), whereas she does see one notable problem in the Court’s reasoning. Namely, she finds that the reference to European agreements in Article 4(2) of the Maastricht Social Policy Agreement and the extension possibility by a Council decision of agreements at European level (now Article 139 EC) ‘is almost unexpectedly made’ (*ibid.*, p. 107; paragraph 58 of *Albany*). She notes it is difficult to understand ‘why such different species of collective agreements, each based on its own legal order – one national, one supranational – should be offered as examples to be interpreted along similar lines of thinking.’ National collective agreements naturally are deeply rooted in the rich national legal-societal culture and framework (even a lack of a law on collective agreements as in Denmark) whereas European agreements, their extension included, depend on a reference to promotion of social dialogue in Articles 136 and 138, and two general clauses in Article 139 EC. Still, certain restrictions of competition as well as the social policy objectives sought or working conditions agreed are

The debate around the judgment has not revealed serious reasons to amend the above characterisation. *Albany* is a landmark decision in the developments in the EC social and labour law. However, I admit that our expression that sectoral collective agreements are *a priori* excluded from competition rules may lead to extreme further interpretations, ignoring the fact that the agreements must qualify under the nature and purpose test. To avoid this risk Fahlbeck has described the Albany-immunity as meaning that collective agreements are *prima facie* excluded from competition rules.

²⁵ I find that the difference between *a priori* and *prima facie* is here just a matter of taste issue, given that we in Bruun & Hellsten 2001 always emphasised the nature and purpose test. However, due to the time factor Bruun & Hellsten 2001 and Hellsten 2005 did not include all the relevant debate. I therefore discuss some further presentations before concluding with some remarks mainly concerning a post-Amsterdam fundamental rights aspect in the *Albany* context.

1.3.1 Evju's Assessment On *Albany*

Evju's analysis of *Albany*, 'Collective Agreements and Competition Law. The *Albany* Puzzle, and *van der Woude*', ²⁶ is generally rather neutral and analytical, on a first appraisal. I will comment only on its main positions.

As to *Albany*, Evju first notes that the Court did not embark on any comparative analysis as the Advocate General did. Second, Evju is right in presenting the *compound* structure behind the first real answer given by the ECJ (in paragraph 64 of *Albany*). For that purpose the ECJ in its paragraph 52 of *Albany* fixed the three compound parameters: (1) setting up a single pension fund for a whole sector (2) by a collective bargaining agreement (CBA) and (3) asking by a joint request of the social partners the public authorities to make affiliation to that fund compulsory. ²⁷ In *Albany* this three-fold composition and/or question was in fact made by the ECJ itself because the national (district) court in *Albany* (*unlike* in *Brentjens* and *Drijvende Bokken*) did not pose a question in this form but its first question concerned directly the third component, i.e. the request to make the affiliation compulsory (*erga omnes*). However, Evju notes and quotes the pivotal paragraph 60 of *Albany* but it seems that Evju nowhere notes how the interpretative path (or, a normative pyramid ²⁸) of the ECJ started from Article 2 EC. Thereof the ECJ quoted (in paragraph 54 of *Albany*) the tasks of the Community 'to promote throughout the Community a harmonious and

inherent in both 'species' of agreements and the extension of agreements exists in a clear majority of (the 'old') Member States. It is natural that the Court resorted to European agreements (and their extension) as an argument. Finally, when Silvana Sciarra presents as a subsumed justification the Court's attempt to reinforce its own arguments 'by letting such collective roots penetrate as deeply as possible in Community law', it is appropriate to observe that according to the Court 'these collective roots' also penetrated or took effect in Community law by virtue of the Maastricht Social Policy Agreement.

²⁵ Reinhold Fahlbeck, book annotation: Niklas Bruun og Jari Hellsten (red.), Collective Agreement and Competition Law in the EU. The Report of the COLCOM-project, Tidsskrift for Rettsvitenskap No. 4-5 2001, p. 919. Otherwise Fahlbeck seems to accept the analysis of the Albany-immunity in Bruun & Hellsten 2001.

²⁶ IJLLIR vol. 17/2, 165-184, 2001.

²⁷ Evju, p. 172.

²⁸ As to the 'pyramidal' interpretation of *Albany*, see Hellsten 2005, section 2.6, pp. 68-71.

balanced development of economic activities’ and ‘a high level of employment and of social protection’. He in fact notices only that the collective agreements concerned are ‘similar’ to those deriving from the ‘social dialogue’ (quotation marks by Evju) and presents this as a condensed ground for the pivotal demarcation between the two areas of law (concluding in the immunity) in paragraph 60 of *Albany*.²⁹

A third difference as to the analysis of Advocate General for Evju is that in defining the material scope of the immunity the ECJ did not adopt Advocate General’s notion of ‘core subjects’ that do not ‘directly affect third parties or markets’.³⁰ This position I share.

What Evju then qualifies as his ‘first analysis’ seems to reveal some positions subject to my critical comments. His starting point is that the ECJ in *Albany* did not adopt, at least not explicitly, as he points it out, a notion that “any and all collective agreements between management and labour fall within the scope of Article [81] by virtue of an ‘implied agreement’ on the employer side”.³¹ Some comments are necessary. First, Evju clearly spells out how the ECJ dismissed the idea of an implied agreement of employers falling under the ambit of Article 81. Second, the quoted statement is too cautious. Namely, I maintain that the ECJ set up the immunity the other way round: collective agreements fall under Article 81 only if their nature and purpose justify it.

A clear source of disagreement arises in Evju’s subsequent position; i.e. that the Court would have ‘in effect *bypassed* the whole issue of the scope of Article [81(1)] *ratione personae*’.³² Evju seems to bypass, indeed, the fact that the ECJ in paragraph 59 of *Albany* discusses agreements of the social partners (management and labour) and in paragraph 62 further qualifies them as representative organizations of employers and workers. Awaiting anything more would surpass the limits of the case; it concerned a certain sectoral collective agreement. Reading paragraphs 59 and 62 together clearly shows that ‘management and labour’ in paragraph 59 is a general definition while paragraph 62 expresses an outcome *in casu*; i.e. it implies that to enjoy the immunity the organizations concluding the agreement concerned must be representative ones. One might wonder what this is doing if it is not discussing the scope of Article 81 and the immunity *ratione personae*. I dare to suggest that Evju’s conclusion might result from the English version of paragraph 62. I recall that one must read paragraph 62 in the French etc. versions instead of the English one which refers to organizations (vaguely) ‘*representing*’ employers and workers; e.g. in French the text clearly reads ‘*représentatives*’ instead of ‘*représentants*’.³³

²⁹ Leaving nearby aside, i.e. on the level of reminding only of the similitude to social dialogue, the constitutional interpretation of the Treaty as a whole seems to be the opposite of Prétot’s assertion. He regretted how the immunity was based on a quasi-ideological interpretation of Articles 2 and 3 EC while the case should have been decided on the basis of Article 81 (ex 85) alone. See Xavier Prétot, *La cour de justice des Communautés Européennes et les fonds de pension néerlandais*. *Droit social* 1/2000, p. 107.

³⁰ Evju, p. 173.

³¹ *Ibid.*, p. 174.

³² *Loc.cit.*; italics by Evju.

³³ See my explanation on the same issue in section 1.3.2.2 The Principal *Albany*-Criticism of De Vos, *in fine*.

A further example of Evju's positions requiring comments is the position maintaining that the ECJ (in its compound approach) did not answer 'the crucial question of whether a collective agreement *in itself* is an agreement that may be caught by Article [81]'.³⁴ We learn below that the answer to this *prima facie* peculiar question is linked to the above discussion of *ratione personae*. Anyway, Evju seems to propose that in addition to the general immunity of collective agreements set up in paragraph 59 and 60 of *Albany* there would be a question of the status of a collective agreement *in itself*. I admit that I cannot follow this 'in itself' path because there is, indeed, the general answer in paragraphs 59 and 60 of *Albany*, although it is in the form of a certain conceptual apparatus where the agreement must – to enjoy the immunity – qualify as to both its nature and purpose. However, while Evju's question seems to be superfluous, he first firmly asserts that one cannot deduce from *Albany* a position that trade unions would generally be 'undertakings' in the sense of Article 81 (I agree). He, however, continues by stating that the ECJ 'was in no need of taking a stand on whether a trade union generally must be regarded as an "undertaking", nor on whether collective agreements in general fall within the scope of Article [81]'. This he found as a sufficient reason for the lack of a position being taken by the ECJ on the status of trade union and on the scope *ratione personae* of Article 81.³⁵ I have to insist – again – that in reality the ECJ took a stand on a general level as to the position of collective agreements and, in paragraph 59, it also took a stand regarding *ratione personae* – a priori freeing the negotiating social partners from the ambit of Article 81.

Evju's conclusion on the scope of the *Albany*-immunity also invites some comments. Namely, he finds that *ratione materiae* the ECJ's position "leaves the impression of an approach similar to that of 'core subjects', whereby a distinction still could be drawn between issues 'directly' relating to the improvement of the 'conditions of work and employment'... He further finds that the Court's considerations offer limited guidance on how to 'draw the borderline between collective agreements provisions that are exempted from Article [81] and those that are not – if and when a collective agreement is caught by Article [81] *ratione personae*.'"³⁶ Thus, Evju seems to foresee that the ECJ should in one case not just fill in a gap of decades by laying down the immunity of collective agreements in relation to competition rules but that it should also be able to give simultaneously clear borderlines for all related issues in this field. I find such a requirement as unfair, given especially how cautious Evju is in reading *Albany*, although probably as hampered by the English, Danish and Swedish versions³⁷ of paragraph 62 which obviously influenced him not to see the definition *ratione personae* in a combined reading of paragraphs 59 and 62. Both *ratione materiae* and *personae* it is interesting that Evju himself – who criticises the outcome as rather vague in both senses – does not even mention the '*ultima ratio*' for the exclusion of management and labour (or, their representative organizations) from the ambit of Article 81: the serious undermining of the social policy objectives if the negotiating management and labour were a priori caught by Article 81. Worth noting is also that Evju does not see the function of 'nature' and 'purpose' of the agreements as safety valves against masked distortions of competition. As to the alleged vagueness of the scope *ratione materiae*, Evju is right to the extent that good reasons

³⁴ Ibid.

³⁵ Ibid., p. 176.

³⁶ Ibid., p. 177.

³⁷ See my explanation on this linguistic problem in section 1.3.2.2, *infra*, in fine.

can be found for both ‘social policy objectives’ and ‘working conditions’ to determine the boundaries of the immunity.

1.3.2 De Vos’ Criticism

1.3.2.1 The Pre-*Albany* Analysis of De Vos

Marc De Vos, a Professor of Labour and Private Law from Ghent, Belgium, gives already in his introduction³⁸ a hint on the direction of his analysis concerning the possible immunity of collective labour agreements vis-à-vis competition rules by stating that the background is ideological or economic. Thus, it does not reflect any *per se* background of the social rights of the workers concerned.

In describing the ‘positive’ and ‘negative’ economic effects, De Vos denotes the ‘public good’ nature of collective bargaining: many people benefit or no one does. Furthermore, ‘[u]nions and the collective bargaining process can...serve as an informed and informative communication channel, allowing management to introduce timely improvements in production or working conditions.’³⁹ The impression ‘...management to introduce timely improvements...in working conditions’ is telling, indeed. For De Vos, there seems to be no way for such improvements to be introduced as stemming from demands, let alone from an industrial action, of workers and/or their organisations. However, De Vos denotes how the positive assessments of the benefits of collective bargaining have reached, next to law academia, even the World Bank; while his positive assessment approach does not pose the question whether the unions in their present legal form are ‘the only and most effective answer to the efficiency problems they are claimed to have solved’.⁴⁰

De Vos further describes – neutrally - the classic Austrian-school economic mantra or neo-liberal doctrine which does not want to leave any place for any collective regulation of working conditions. Via the roots of any modern labour law in the early 20th century he denotes certain fresher signs of new individualism but concludes how ‘the existing legal architecture of labour relations remains largely inspired by the classic labour law model, where individual liberty is subordinated to collective representation and to societal interests of labour relations’.⁴¹ Its kernel he sees in correcting or avoiding the expected excesses of laissez faire liberty. This anti neo-liberal approach has ‘its most emblematic legal expression in the ILO Constitution’s credo that “labour is not a commodity”’ which De Vos eloquently describes as ‘a clear Marxist phraseology that diametrically opposes the neo-liberal approach of labour relations.’⁴² This distinction between labour and genuine commodities he finds ‘of course’ superficial and artificial even though the labour’s organization

³⁸ Marc De Vos, *Collective Labour Agreements and European Competition Law. An Inherent Contradiction?* In De Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer Law International pp. 53-86 at 53.

³⁹ Ibid., p. 54.

⁴⁰ Ibid., p. 54-5.

⁴¹ Ibid., p. 59.

⁴² Ibid. The Philadelphia Declaration was, by definition, imposed by the victory side of the WWII. However, to my mind, stating ‘labour is not a commodity’ did not make Franklin D. Roosevelt a Marxist.

indirectly but necessarily affects its market. We then face a first core element in the ‘pre-*Albany* analysis’ of De Vos that necessitates really critical comments. Namely, as a perhaps combined effect of the limited legal force of the ILO Constitution and the market reality (i.e. a de facto effect on the market of ‘genuine’ commodities) he finds it is possible to explain why the EC Member States typically do not have any blanket labour exclusion in their competition law. ‘If there is any rule to be drawn from the EC Member States, it is one of careful balancing that amounts to a partial immunity from antitrust law. In any event, Member State solutions to the labour v. competition conundrum at the national level are wholly separate from the EC level where no dogmatic statement on the nature of labour obscures the debate.’^{43 44}

It is not surprising that De Vos in this particular place refers to the comparative analysis of Advocate General Jacobs in *Albany* (paragraphs 80-112 of the opinion) and to its summarized overview presented by Van den Bergh and Camesasca.⁴⁵

The author had the opportunity to edit and partially write the book Bruun & Hellsten, *Collective Agreement and Competition Law in the EU* (Bruun & Hellsten 2001) where the national solutions in deciding the contents and scope of the immunity were also discussed. The picture appeared rather different from the description offered by Advocate General. Namely, as to the EC Member States concerned, the AG referred to France, Finland, Denmark, Germany and United Kingdom. More elaborately the AG also discussed the legal distinctions in the United States. As to EU Member States, the description presented by the AG was not accurate in the case of France, Germany and Finland but it gave a too competition-minded picture of the national situation.⁴⁶ As such, the conclusion of the AG was backed up by only the experience of two Member States. His conclusion was that in the form of questions for national courts, the targeting to core issues of bargaining, effects on markets of goods and services, and third parties, tends to limit the scope of the immunity.⁴⁷ In Bruun & Hellsten 2001 we came to the conclusion that there are in fact three answers to the relationship between collective agreements and competition law in the EC Member States:

- the Nordic model: a law-based immunity explicitly recognised in competition law;

⁴³ Ibid., p. 60.

⁴⁴ On the other hand, on p. 61 De Vos describes the situation in the Member States as one where ‘freedom of collective bargaining and free competition coexist without explicit hierarchy and with no statutory framework to resolve their apparent contradiction, see De Vos, p. 61; this assertion seems to be closer to the reality in the continental group of countries; see below footnote 48.

⁴⁵ See Roger Van den Bergh and Peter Camesasca, *Irreconcilable Principles? The Court of Justice exempts collective labour agreements from the wrath of antitrust*. *European Law Review* Vol. 25, 2000, pp. 495-9. As to a critical approach vis-à-vis the comparative analysis of AG Jacobs, also see Markku Kiikeri, *Comparative Legal Reasoning and European Law*, Kluwer Academic Publishers 2001, pp. 224-227 and 242. He even questions whether the interpretation of national systems is really transferable to the Community law, where the interpretation by the Community Court must be somewhat more extensive and the nature of ‘social rules’ is very different. The ‘social rules’ in Community law are still in the developmental stage; *ibid.*, p. 225-6.

⁴⁶ As to details in this criticism, see Bruun & Hellsten 2001, pp. 71-72.

⁴⁷ See paragraph 112 of the opinion.

- a Continental European group where no immunity is fixed by national law but it is derived from constitutional rights or freedoms; this is the prevailing picture;
- the Anglo-Saxon tradition where competition law in principle applies to collective bargaining agreements; however, the present law in UK clearly corresponds to the contents of EU rules.⁴⁸

I recall how De Vos, referring to the comparative overview of AG Jacobs came to the conclusion that a partial immunity would be a justified conclusion drawn from the practice in the Member States. I am afraid that such a conclusion is simply wrong. The comparative overview of AG Jacobs was not coherently comparative since it covered only a few countries, nor was it even a reliable overview of the countries covered.

Through discussing in brief the right to collective bargaining as a potentially fundamental right⁴⁹ - which is for him no indication of an antitrust immunity, not even as enshrined in Article 28 of the EU Charter of Fundamental Rights⁵⁰ – De Vos comes to his pre-Albany conclusion: while the right to collective bargaining obviously is a fundamental right, it cannot be left as a meaningless qualification. Therefore, and while collective bargaining on the other hand cannot be left as ‘untouchable’, ‘a middle ground will have to be found.’⁵¹ This pre-Albany analysis is then completed by an overview of the case-law that De Vos finds relevant: state aid in employment support issues, employment agencies and the provision of manpower, prohibition of

⁴⁸ On the analysis of the national situation, see Bruun & Hellsten 2001, pp. 66-71

⁴⁹ De Vos denotes both Deinert’s positive position (Olaf Deinert, *Der europäische Kollektivvertrag*, Baden-Baden, Nomos, 1999, pp. 254-435), and some ECHR practice that has not recognised the right to collective bargaining a fundamental right: Svenska Lokmannaförbundet (1976) Eur.Court H.R. Rep. Series A, no. 20; Schmidt and Dahlström, (1976) Series A, no. 21, Gustafsson (1996) R.J.D., II, no. 9; Wilson & National Union of Journalists, 2 July 2002, nos. 30668/96, 30671/96 and 30678/96. He then equals to this case-law the case UEAPME, T-135/96, [1998] ECR II-2335, with the implication that the UEAPME judgment would support his conclusion that a fundamental right does not imply a duty to enter into negotiations with a given organisation; see the footnote 28 of De Vos on p. 61. In reality the case UEAPME did not encapsulate any argumentation with the fundamental right to collective bargaining. It was a suit of the European SME employer organisation (UEAPME) against the Directive 96/34 on Parental leave with the pretext that the inter-professional agreement behind the Directive was not appropriately representative. The CFI de facto rejected (in formal terms declared as inadmissible under Article 230 (ex 173) EC) the lawsuit of the UEAPME. It withdrew its appeal after having concluded a co-operation agreement with the UNICE that guaranteed the presence of the UEAPME in later negotiations on the European level.

⁵⁰ De Vos denotes how the EU Charter also includes ‘the right to conduct a business (art. 16)’ and how the Charter ‘therefore maintains the tension between free competition and free collective bargaining’; De Vos p. 62. De Vos passes over the fact that while the Charter includes a principal recognition of the right to conduct a business, it does not mention outside the Preamble their specific EU level emblems: the market freedoms or, in other words, the free movement rules (more or less) guaranteed by the Treaty. Besides, the right to conduct a business is mainly a general recognition of that right. Labour legislation notoriously includes a myriad of restrictive elements.

⁵¹ Ibid., p. 62. The only reference of De Vos here is S. Graf von Wallwitz, *Tarifverträge und die Wettbewerbsordnung des EG-Vertrages*, Peter Lang, Frankfurt am Main 1997, p. 106.

Sunday work and tourist guide cases.⁵² The last mentioned requires a couple of specific comments.

In the tourist guide case *SETTG* the ECJ, maintains De Vos, confirmed that ‘maintaining industrial peace and settling collective labour disputes are plain economic aims, not a reason of general interest justifying restrictions on the free provision of services.’ And he concluded: ‘A clearer inclusion of collective labour relations in the spectrum of the common economic market can hardly be imagined.’

⁵³ In reality the reasoning in *SETTG* was not that straightforward. The reasoning of the Greek government showed that a compulsory form of employment contract for any paid tourist guides in the free provision of services ended a collective labour dispute that was important for tourism and thereby for the economy of that State. That way the ECJ found that the aim concerned (not the industrial peace as such) was economic (paragraph 23) and unable to justify restrictions on the free provision of services. The case did not concern competition rules. In fact, of the cases De Vos presents only *Höfner* and *Job Centre II* fall under competition rules, namely abuse of a dominant position as state monopolies.

However, the conclusion of De Vos, based on his interpretation of the case-law he found as of a pre-Albany nature, was that “the ‘no commodity’ slogan finds no adherents at the ECJ”; and that ‘the Court’s refusal to separate labour from the Treaty’s competition rules confirms and testifies to the latter’s general material scope.’⁵⁴ In fact, De Vos admits that the cases he presents do not tangle directly the relationship between collective agreements and competition rules but he insists that ‘they tellingly contain no special consideration where collective labour relations are indeed involved.’

The case-law discussed by De Vos shows that he has tried to gather, indeed, any case supporting any critical conclusion related to *Albany*. I am afraid that in so doing he is not too convincing. However, after all it is also important to denote the main submissions of De Vos regarding judgment *Albany* and its ‘progeny’ – to use an expression of De Vos.

1.3.2.2 The Principal *Albany*-Criticism of De Vos

Already the main heading of De Vos is telling: ‘The Surprising Labour Exemption: *Albany* and Its Progeny.’ The second sub-heading confirms the rest of the melancholy melody: ‘A Fundamental Critique of *Albany*’ with sub-sub-headings ‘Incorrect Premises’ and ‘Unnecessary and Unjustified Labour Supremacy’.

Under the first sub-sub-heading ‘A Partial Labour Exemption’ the criticism of De Vos describes the *Albany*-immunity as a Hegelian style and ‘quick’ creature (whereas the

⁵² As to employment aid cases, De Vos refers especially to case C-251/97 *Commission v. France* [1999] ECR I-6639; at employment agencies De Vos refers i.a. to case C-41/90 *Höfner* [1991] ECR I-1979 and C-111/94 *Job Centre* [1997] ECR I-7119; at Sunday work De Vos refers i.a. to case C-145/88 *Torfaen* [1989] ECR I-3851; and at tourist guides i.a. case C-398/95 *SETTG v. Ergasias* [1997] ECR I-3091.

⁵³ De Vos, p. 66.

⁵⁴ Ibid.

immunity proposed by AG Jacobs was a balanced and mitigated escape from competition law intrusion) where counting – by the Court – Articles 3(1)(g), 2 and 118b (now Article 139) EC is a *thesis*. The *antithesis* is the inherent restriction of competition by collective agreements. The immunity, declared in paragraph 60 of *Albany*, marks a *synthesis*. I will pass over whether we may fully agree with that description. In any case, one can agree (although with an opposite ideological premise) with what seems to be the culminating general criticism of De Vos:

‘In the perceived field of tension between the EC’s economic aims, for which free competition is instrumental, and the EC’s social policy which supports the negotiations of collective labour agreement, the ECJ therefore gives precedence to the social over the economic. *Albany* and its progeny symbolically contradict the traditionally assumed primacy of economic in the European integration process. They are moreover the first, and so far only cases, where the ECJ has self-imposed a categorical limitation to the material scope of EC competition law.’⁵⁵

Under ‘Incorrect Premises’ De Vos criticises the ECJ because it justified an immunity for national, i.e. Dutch, collective agreements with European collective agreements (now Articles 138 and 139 EC). The submission implies that their status could be *per se* different. I cannot see how this could be the case (omitting the dichotomy national-European), although De Vos finds that one can see the difference even in a superficial reading. He also maintains that the ECJ forgot the market integration function of competition rules that may sometimes, given their supposed efficiency effects, overrule ‘postulating any inherent contradiction’ between collective agreements and competition rules.⁵⁶

Under ‘Unnecessary and Unjustified Labour Supremacy’ De Vos once again flags the US Supreme Court’s ‘accommodating’ immunity policy and submits how AG Jacobs proposed a similar model in *Albany*.⁵⁷ De Vos welcomes the Commission’s policy that is by analogy anchored to sports cases: it does not apply Article 81 to inherent and organisationally necessary sports rules. He also finds that a sort of proportionality test ‘exempts’ those sporting restrictions. My comment is that there is no sports case-law involving a collective labour agreement. The proportionality aspect I comment on in section 2.7.1, *infra*. However, under ‘Unnecessary and unjustified Labour Supremacy’ De Vos makes as his strongest normative effort a reference to text of the Treaty (Articles 138, 139, 81, 136 (with its reference to the common market), 2 (economic policy based on the Internal Market), and finally Article 4: the principle of

⁵⁵ Ibid., p. 68. On the preceding page De Vos had called the status of collective agreements vis-à-vis competition rules – in the eyes of the ECJ – as a ‘*per se* preferential’. After the first sentence cited De Vos referred to his own article in Dutch.

⁵⁶ Ibid., pp. 69-70

⁵⁷ Marie Malaurie-Vignal has presented how we should also read the *Albany*-immunity in an inverted way: issues outside the essence of collective bargaining or those meaning to affect directly the relationships between employers and third parties, like the clients, deliverers or competing employers, would be without immunity. Marie Malaurie-Vignal, *Droit de la concurrence interne et communautaire*, 3e éd. 2005, p. 74. This inverted reading – akin to the immunity of core subjects by AG Jacobs that do not affect third parties and markets – simply does not find support in the text of *Albany* that operates with the agreements’ nature and purpose.

an open market economy with free competition. His reading ‘clearly presents the common market and its free competition as overarching goals from which no EC policy can be exempted.’ ‘If any hierarchy is to be wrung from the TEC, precedence should rather go to competition policy over social policy rather than *vice versa*.’ He then maintains, no less, that ‘the naked truth...is that social policy and competition policy coexist as common EC objectives without a formal internal hierarchy and that the authors of the TEC, especially when developing the EC’s social policy in *Maastricht* and *Amsterdam*, were apparently unaware of any potential conflict between the policies.’ For De Vos, this ‘reality’ again called for a *modus vivendi*, not a partial priority of one policy over the other.⁵⁸

It is easy to see that De Vos would like to see the ECJ confirm the priority of competition rules over social policy. In this line he is more consistent than in claiming that no priority can be set up but only an accommodation between the two policies. In this claim he in a way goes even further than AG Jacobs who clearly saw that EC competition rules were not drafted with a view to their application to collective bargaining agreements, see paragraph 179 of the opinion. Under ‘Contentious Relationship with the Previous Case-law’ De Vos asks the reason for the immunity of collective agreements and maintains that it remains a mystery.⁵⁹ I have two essential comments. First, the ECJ answered this question by referring to the serious undermining of the social policy objectives of the Treaty if the competition rules were applied to them. Second, even AG Jacobs saw many aspects of general good in collective agreements, saw how the application of competition rules would reverse the national practice and also proposed an automatic anti-trust immunity, although limited to core subjects such as wages and working conditions; see in particular paragraphs 178 and 179 of the opinion. In this sense the criticism of De Vos *de facto* also addresses the proposal of AG Jacobs.

Furthering the ‘mystery’ argument, De Vos asks whether *Albany* and its progeny (*van der Woude* and *Pavlov*) herald ‘a dramatic shift that will in due course be extended to other ‘special’ sectors such as environment, public health, education or consumer protection?’⁶⁰ In this question De Vos, first, forgets that there are express Treaty rules on each of these ‘special’ sectors, shaping accordingly their relationship with competition rules. Second, for collective agreements there was no precedent, an issue also highlighted by AG Jacobs (who otherwise outlawed a general labour exemption; see paragraphs 120-130 of the opinion). This therefore undermines the conclusion of De Vos that ‘*Albany*’s labour exemption rests upon false premises and is technically both unnecessary and unwarranted, especially considering the line of cases that preceded it.’

All in all, the criticism of De Vos is fundamental, indeed. According to him, ‘time will tell whether *Albany* and its immediate progeny are but an *accident de parcours*, or the dawning of a new age in the development of the EC, away from the *pensée unique* of free competition.’⁶¹ I think that time has already shown clearly that *Albany* was neither an accident, nor something provisional. No national court has challenged

⁵⁸ Ibid., p. 72.

⁵⁹ Ibid., pp. 73-4.

⁶⁰ Ibid., 74.

⁶¹ Ibid.

it with questions subject to a preliminary ruling. No Commission practice shows an attempt to challenge it even though its high officer Mr. Gyselen in 2000 came up with sharp criticism that was partially directed to the basic immunity of collective agreements and to the first ruling in *Albany* on the *erga omnes* declaration of the agreement concerned.⁶² No corresponding Treaty amendment was proposed in the preparations of the Treaty of Nice, signed in 2000, or of the Constitutional Treaty. Really narrow but simultaneously authoritative criticism came from AG Jacobs in *Pavlov* where he asked if the *Albany* reasoning would stand (only) regarding the ways of safeguarding an appropriate judicial review of the decisions of a pension fund based on a collective agreement and enjoying exclusive rights under Article 86 EC.⁶³ Otherwise he did not contest the *Albany*-immunity in *Pavlov*: see e.g. paragraphs 97-98 of the AG's opinion.

The detailed description of the detailed 'contours' of the *Albany*-immunity by De Vos does not bring any great surprises, except perhaps that he finds how collective agreements at all levels are covered by the immunity.⁶⁴

A second, perhaps surprising outcome is that De Vos does not find the representativeness of the social partners a necessary condition for the immunity under *Albany* although he himself finds that it should be so.⁶⁵ This further reveals a difference between the French and Dutch versions of *Albany*. Namely, the French version of paragraph 62 of *Albany* refers to collective negotiations between representative social partners ('*négociation collective entre les organisations représentatives des employeurs et des travailleurs*'). The Dutch version, language of the case, speaks about collective negotiations between employers' and workers' organisations ('*collectieve onderhandelingen tussen werkgevers- en werknemersorganisaties*'). The English (with the 'organisations representing' instead of representative organisations), Danish, German and Swedish versions are on the line of the Dutch, but the Italian and Spanish on the line of the French version. While the French version is what the judges have jointly agreed upon (or confirmed by a majority), the Dutch one is the only official one. It is, of course, regrettable that the judgment leaves good grounds for two diametrically opposite interpretations in this kind of essential issue. Not just De Vos but also Evju has taken the judgment as setting up no criteria for the representativeness of the social partners concerned.

⁶² See Luc Gyselen, case annotation (Cases *Albany*, *Brentjens* and *Drijvende Bokken*), CMLRev. 37:425-448, April 2000.

⁶³ See the opinion in joined cases C-180/98 to C-184/98 *Pavlov et al.* [2000] ECR I-6451, paragraphs 199-200.

⁶⁴ De Vos, p. 74. It is clear, however, that while *Albany* dealt with sectoral collective agreements it could not define exhaustively especially the lot of company-level agreements. One has to keep in mind at least the possibility of yellow agreements. However, obviously the 'nature and purpose' test also applies at the company level and it is also clearly arguable that genuine company-level agreements may enjoy the *Albany*-immunity. In *van der Woude* (see footnote 23, *supra*) AG Fennelly expressed the same (although provisional) position as a response to a clarification request submitted by the government of the United Kingdom; see footnote 14 of the Opinion of 11.5.2000.

⁶⁵ *Ibid.*

However, the French version as the authoritative one (as used by the judges *in camera*) is the reliable source for the understanding of the judgment (also) at this point.⁶⁶

1.3.3 Ichino's Assessment on *Albany*

Pietro Ichino offers one of the law and economics critics of *Albany*.⁶⁷ While he, professor of labour law in Italy, refers to the history up to the French *Le Chapelier Act* of 1792 and the British *Combination Act* of 1799, his analysis is not 'too precise' in highlighting how neither the EC Treaty nor the derived law acknowledges the right to union freedom and collective bargaining. In a footnote he recognises Articles 139, 137(4) and 137(1) representing a more relevant role for collective bargaining but does not recognise at all Article 136 EC with its reference to the Community Charter of Fundamental Social Rights 1989 and European Social Charter 1961, both of which include the freedom to join a trade union and the right to collective bargaining.⁶⁸

Ichino's approach is also purely competition-minded in that he attacks the "Commission's thesis, according to which collective agreements could not fall within the notion of 'agreement among enterprises'". This position must mean the written observations of the Commission since the judgment does not contain any such statement of the Commission. Instead, from paragraph 47 of *Albany* we learn that the company Albany submitted the opposite view, clearly also supported by Ichino: that a collective bargaining agreement ("CBA") implies inside the employer side an agreement in the sense of Article 81 EC. That is also the cornerstone of the analysis of Advocate General in Albany (not signed by the Court).⁶⁹ Furthermore, as shown earlier the Court did not share this view while it acknowledged the restrictions on competition inherent in sectoral CBAs. For the Court the essential feature of a CBA was the link *between* the parties, not any possible express or implied agreements *inside* the negotiating management and labour. It is finally rather easy to distinguish the *labour law rationale* in this 'agreement connotation'; that it is between the collectively negotiating parties. I also recall how this 'inside approach' is a typical example of viewing the issue from the competition law angle: its grasp a priori covers any agreement that then must legitimise its exceptional immunity.

⁶⁶ Fahlbeck has also found the difference between the linguistic versions. For him it is, however, unclear whether the English, Dutch, German, Danish and Swedish versions are erroneous, as looks obvious. See Fahlbeck, footnote 25, *supra*, p. 917 (footnote 7). Fahlbeck also denotes that it would have been appropriate to remind the reader in Bruun & Hellsten 2001 of these two language 'interpretations' instead of noting only the difference between the French and English versions. Fahlbeck's comment is in principle justified while it cannot challenge the position of French as the authoritative version.

⁶⁷ Pietro Ichino, Collective Bargaining and Antitrust Laws: an Open Issue. IJCLIR Vol. 17/2, 185-198, 2001.

⁶⁸ Ibid., p. 188.

⁶⁹ Ibid, p. 190. See the opinion of AG Jacobs, paragraphs 237-244. The Albany-immunity in paragraphs 59 and 60 of the judgment impliedly rejected this position. The AG also refers to the relevant decision of the Commission, i.e. that concerning the opening hours of Irish Banks in which the Commission took the same view as the AG, paragraph 243 of the Opinion: the Irish Banks' Standing Committee, OJ 1986 L 295, p. 28, paragraph 16.

Ichino sees a point of attack in the Court's reasoning in the 'fact' that the line of argumentation in *Albany* would free any related collective agreement from anti-trust scrutiny (because such agreements are intended to improve 'working conditions'). For him, however, an objective assessment of a CBA is no more convincing. I do not share this criticism, nor where Ichino disregards a distinction between the (unlawful) restriction of competition in goods and services, and the (lawful) restrictions in a labour market. His grounds are that minimum standards in a CBA may easily become maximum norms (as stipulations on business hours prove, according to him), that wage increases mostly turn into a price increase and that in labour intensive services restricting competition among workers immediately translates into restricting competition among enterprises.⁷⁰ In his examples Ichino ignores the fact that CBAs in general terms are beneficial for workers, even for white collar workers nowadays. Historically CBAs result in every country from a tension, if not sometimes also from a social struggle, between management and labour. In stating this it is not my intention to disregard a paternalistic employer view that for a couple of centuries has taken a fairly regulated relationship with labour as the only socially meaningful one and even morally acceptable way of treating 'the social issue'. It has its firm place in the history of labour law. Anyway, I maintain that the grounds expressed by Ichino disregard the difference between competition law and collective agreements by presenting their relationship as one between two technically very similar legal structures. The rationale behind each of these legal features is by definition different. While Ichino – via his examples – sees that *Albany* raises the broader question about the reasons of a 'labour market exemption' from competition rules, he – pushed by the 'power' of his examples – disregards the Court's simple reason (social policy objectives seriously undermined) for it and moves on to seek a solution in economists' thinking.

However, Ichino's main criticism against the judgment is that the Court's answer to the question why CBAs should have an immunity vis-à-vis competition rules was too generic. He asserts that 'the difficulty in precisely identifying the reasons for such immunity prevented its limits being defined in the judgment in a clear and persuasive way'.⁷¹ This position is true in the sense that the judgment left us with some uncertainty as to the limits of the immunity: whether it is defined via 'working conditions' (as Ichino takes it; paragraph 63 of *Albany*) or 'social policy objectives' (paragraph 59).⁷² So far Ichino is right. However, his own solution is something a labour lawyer cannot truly sign on to: namely, that a labour law approach could give such limits only with the aid of an economist. He goes on to assert that 'the connection between law and economics was exactly what was totally missing from the judgment justification'.⁷³

Where does Ichino's law and economics approach bring us? With an '*insiders/outside model*' he asserts that only collective bargaining which also represents outsiders would justify it as subject to antitrust immunity. This is akin to Ichino's statement that he shares the Advocate General's view according to which only CBAs not directly affecting third parties may enjoy the antitrust immunity.⁷⁴

⁷⁰ Ichino, p. 191.

⁷¹ Ibid., p. 194.

⁷² See footnote 23, *supra*.

⁷³ Ichino, p. 194.

⁷⁴ See Ichino's footnote 10 on p. 194 where he also announces that he shares the AG's conclusion that EC law does not 'make an exception to the general competition discipline in

Under ‘*job security as rational allocation of risk of unexpected occurrences*’ he would let the national legislator (lawmaker) decide, within his large discretion, which job security clauses would be justified, subject to EC law scrutiny.⁷⁵ Under ‘*Collective agreement as instrument of transaction costs reduction*’ he would allow the continuous role of the CBAs, but possibly adding a ‘default regulation’ clause, thus allowing derogations negotiated by individual agreements. A brief comment on these proposals is this: they ignore the fact that *Albany* was a constitutional decision anchored even in Articles 2 and 3 EC. It is not to be expected that the ECJ would change its line of reasoning on the basic antitrust immunity without the Treaty first being amended, and that does not seem at all likely. A more general comment is that the law and economics approach simply shares the strongly competition-minded viewpoint of AG Jacobs in *Albany*.

1.3.4 Kiikeri’s Analysis on Collective Agreements and Competition Law

Markku Kiikeri offers a rather distinctive and original analysis of collective bargaining and competition rules.⁷⁶ His analysis following the presentation of judgment *Albany* starts by denoting (as if judgment *Albany* did not exist – Kiikeri reasons on the level of legal principles) how it seems ‘fairly strange to apply a set of norms designed to protect the consumer, and the functioning of the selling and retailing market, by activity, which is designed, on the other hand, to protect the interests of the individual as worker, especially where the individual interests are agreed in an agreement between the collective parties (employees and employers) having, in this respect, rather different aims.’⁷⁷ I do agree.

However, Kiikeri raises the question whether the relationship between ‘collective agreeing’ and competition law is ultimately a ‘basic right’ issue. ‘Could there be a right to collective bargaining?’⁷⁸ Kiikeri does not refer to any potential source of such a right but refers to Sulkunen who held on the basis of the judgment that the Court did not accept (de facto rejected, I would say, with a constitutional reasoning reaching even Article 2 EC) the idea of AG Jacobs that collective agreements have sufficient protection under the general principle of freedom of contract. For Sulkunen, this further justified the conclusion that the right to bargain collectively enjoys protection

favour of labour collective bargaining’, and referred to AG’s para. 160; to be precise, in that paragraph the AG stated that there is no EC *fundamental* right to bargain collectively. However, Ichino also shares the view that the ‘Community legal system shows a generic favourable attitude towards collective bargaining as a method for ruling labour relations’ (paragraphs 181-183 of the AG) but adheres then to the ‘reasonable’ balance-making of the AG, thus with the general protection of competition freedom; paragraphs 190-194 of the AG’s opinion. A part of this balance-making was the immunity condition that a collective agreement (besides concluded in good faith on core subjects such as wages and working conditions) does not directly affect third markets and third parties (paragraph 194).

⁷⁵ I admit that some of the Italian examples Ichino presents are rather peculiar in a comparative view, especially a ‘preferential hiring criteria for relatives of workers already employed in the same company’ in the airport personnel and motorways and tunnels concessionary companies; see Ichino, p. 195, footnote 13.

⁷⁶ Markku Kiikeri, *Comparative Legal Reasoning and European Law*, pp. 224-242.

⁷⁷ Op.cit., p. 236.

⁷⁸ Ibid.

also in EC law on the basis of a specific right established in case-law.⁷⁹ He later concluded that *Albany* rendered the right to collective negotiations a fundamental right in the EC.⁸⁰ Kiikeri however finds that ‘the point of departure to the interpretation of this question...appears to be in the conflict between collective agreements and competition law and not so much in the realm of basic [i.e. fundamental] rights’. ‘[N]o really “hard” basic right conflict does really exist.’⁸¹

Kiikeri’s position needs to be elaborated in light of the fact that already paragraph III(e) in the Declaration of Philadelphia 1944, annexed to the ILO Constitution, enshrined a ‘solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve...(e) the effective recognition of the right of collective bargaining’. Furthermore, Article 136 EC refers to the European Social Charter 1961 and the Community Charter of Fundamental Social Rights of Workers of 1989 which both,⁸² as well as the Charter of the Fundamental Rights of the EU (in Article 28), recognize the right to collective bargaining. This said, I leave it open here whether the legal sources referred to really mean – 62 years after the Philadelphia Declaration – a fundamental right achieved. If we take the Article 136 EC references seriously, the answer should be positive.

Kiikeri finds the status of collective bargaining to be *a priori* distinctive in the legal system, because ‘the agreements made in this sphere are designed to achieve social objectives and to actualize the social rights also guaranteed by the state to an individual (rights recognized in one form or another in most of the legal systems in the western world)’.⁸³ However, the conflict between collective agreements and competition law he resolves simply by denoting how competition law provisions seem to be in the end a lower rank set of norms, and the right to free competition lower than the right to collective bargaining.⁸⁴ It is easy to agree with this.

Kiikeri also finds the methods of interpretation between collective and commercial agreements different and important for their status and hierarchy. He highlights how agreements pursuing social policy objectives must be observed from the point of view of the general social policy –maker (whether it is a Member State or the Community). Genuinely and in a transparent process accomplished terms pursuing social policy objectives make therefore “their status in comparison to ‘normal’ market contracts (belonging to the scope of competition law) very strong”.⁸⁵ A disturbing element in this always hypothetical reasoning is that it assumes that collective agreements were anyway subject to competition rules, although Kiikeri clearly does not mean this. However, he finds, already somewhat deviating from the nature and purpose of the agreements (the tools of the Court established in paragraph 60 of *Albany*), that

⁷⁹ Olavi Sulkunen, *Ammattiyhdistysoikeudet Euroopan yhteisön oikeudessa*; in *Työoikeudellisen yhdistyksen vuosikirja*, Helsinki 2000, p. 152.

⁸⁰ *Ibid.*, p. 154.

⁸¹ Kiikeri, p. 237.

⁸² See Article 12 of the 1989 Charter and, respectively, Articles 5 and 6 of the European Social Charter. On Article 5 (right to organize) as a source for the right to collective bargaining, see my comments at (and in) footnote 99, *infra*.

⁸³ *Ibid.*, p. 238.

⁸⁴ *Ibid.*, p. 239. We thus learned that Kiikeri finally also uses the notion of a right to collective bargaining.

⁸⁵ *Ibid.*

collective agreements ‘may be invalidated on a very general basis as not belonging to the category of collective agreements at all’.⁸⁶ I would comment that the purpose tool of the Court may definitely lead it to assess even single terms and clauses in a collective agreement. However, Kiikeri’s firm conclusion is that it is very problematic to use highly instrumental competition rules in invalidating collective agreements and their terms.⁸⁷

In conclusion Kiikeri denotes that collective bargaining and agreeing have social objectives which are in many ways defined in the context of the democratic constitutional system. He continued:

‘What is a social objective in this sense is a matter of a political and fundamental legal system to define positively. Furthermore, the collective bargaining and agreeing is qualified by such elements, which restrict their scope in relation to the “normal political rights”. They are socially and politically defined functions and their scope, as it regards the social objectives, is defined in a constitutionally valid process.’⁸⁸

My comment is that I would not build too much, if anything, here on the juxtaposition political rights – social rights. The latter are also highly political as they often come close to or even form part of constitutional protection which is the highest legal-political activity or sphere of any democratic society. However, Kiikeri continues, always interestingly while in an abstract way:

‘In this sense, it is problematic – but not absolutely impossible – to consider the right to bargain collectively as a fundamental right belonging to the same category as fundamental political and social rights. Thus it seems to be a subordinate “right” implementing the social rights’.

Here my structural comment is that the right to collective bargaining is at the heart of fundamental social rights. That is why it is solemnly declared as an important goal to achieve in the ILO Constitution (via the Philadelphia Declaration, as ‘refreshed’ by the 1998 ILO Declaration of Fundamental Rights at Work, paragraph 2(a)), and why it is referred to as a right in the 1989 Community Charter of Fundamental Social Rights and in the European Social Charter; both Charters are now referred to in Article 136 EC. Finally it is in the Charter of Fundamental Rights of the European Union of 2000 (Article 28), and in the Constitutional Treaty (Article II-88). Therefore, it is impossible to conclude that the right to collective bargaining is just a subordinate right ‘implementing the social rights’ (in the heart of which it is in reality situated and which Kiikeri does not really explore⁸⁹). Reasoning on the fundamental social right to collective bargaining does not need to be abstract anymore since it is already included in the international labour standards. Another issue is how binding the right to collective bargaining is in the above international normative sources.

Kiikeri leaves open the practical effects of an express right to collective bargaining while he refers to its ‘realistically beneficial’ effects, also found by AG Jacobs:

⁸⁶ Ibid., pp. 239-240.

⁸⁷ Ibid., 240.

⁸⁸ Ibid., p. 241.

⁸⁹ But states that it exists in Sweden.

prevention of costly labour conflicts, reduction of transaction costs and promotion of predictability and transparency.⁹⁰ These effects are of course common ground.

Notwithstanding the partially critical comments above it is easy to share the general conclusion of Kiikeri: ‘...no real support from Community law can be indeed found for a general examination of collective agreements by the competition law rules.’⁹¹ Besides, *Albany* resolved – I repeat – the basics of this issue. Another issue is why the judgment is silent about a fundamental social right to collective bargaining. I will attempt to explain this briefly under my next heading.

1.3.5 Concluding and Post-Amsterdam Comments

The fundamental opposition line of De Vos vis-à-vis judgment *Albany* seems to present a rather lonely way of doctrinal thinking. The competition law authorities like Goyder and Van Bael & Bellis do not share it. E.g. van de Gronden takes *Albany* as one judgment amongst others delimiting the scope of competition rules for public policy reasons, however as connected to the rule of reason argument⁹² (which he does not develop in the context of *Albany* but in that of *Wouters*⁹³ where the Court accepted the Dutch ban on barrister-accountant partnerships). Accordingly, the law and economics criticism (like that of Ichino) has not resulted in new preliminary references or other acts challenging *Albany*. Indeed, its single direct labour law ‘descendant’ in the ECJ, judgment *van der Woude*⁹⁴ was rendered by a chamber that naturally followed the reasoning in *Albany*. The same concerns the Norwegian case in the EFTA-Court, *Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) v. Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities)*.⁹⁵ All in all, the argumentation of *Albany*, being linked up to

⁹⁰ Ibid., p. 241 where Kiikeri refers to paragraph 181 of AG Jacobs’ opinion in *Albany*.

⁹¹ Ibid.

⁹² Johan W. van de Gronden, Rule of Reason and Convergence in Internal Market and Competition Law, in Annette Schrauwen (ed.), Rule of Reason. Rethinking another Classic of European Legal Doctrine, Europa Law Publishing 2005, p. 83. Rule of reason assessment means, in the U.S. context, weighing the pro- and contra-competitive effects of a measure or agreement. The Court in *Albany* did not apply this kind of ‘intra-competition’ rule of reason assessment but weighed the inherent restrictions of competition of collective agreements against their social policy objectives, i.e. a factor *outside* competition rules which, consequently, are not enough to explain the constitutional nature of *Albany*. Barnard has also marked the immunity conditions proposed by AG Jacobs in *Albany* (paragraph 194 of the opinion) as a rule of reason approach. The AG required for the immunity that the agreement is concluded in good faith or core issues of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties. Catherine Barnard, EC Employment Law, Oxford University Press 2000, p. 572. Similarly, she has called it as ‘very much the perspective of a competition lawyer’ while the Court applied a ‘labour relations approach’; *ibid.*, p. 571. I agree.

⁹³ Case C-309/99 *Wouters* [2002] ECR I-1577.

⁹⁴ Case C-222/98 *van der Woude* [2000] ECR I-7111. The new feature in this judgment was to legitimize the running of an agreement-based scheme by a single subcontractor; an insurance company runs the agreement-based sickness insurance scheme. On this judgment, see Bruun & Hellsten 2001, p. 56.

⁹⁵ Case E-8/00, judgment of 22.3.2002. The case concerned a non-erga-omnes collective agreement establishing the occupational pension scheme in the municipal sector in Norway.

Article 2 EC and embodying the basics of social dialogue in the EC Treaty, is such that only the ECJ itself could touch it, and that only by sitting in full Court. While this is most unlikely, *Albany* could in theory be quashed by an amendment of the Treaty itself but this is subject to unanimity and ratification process in the Member States. It is certain that there would always be at least one Member State prohibiting any dilution of the constitutional level protection that *Albany* grants to (sectoral) collective agreements. The passage of time (i.e. a case one day) will decide the only relevant subject matter left open in the judgment, thus whether social policy objectives (in paragraph 59) or working conditions (in paragraph 63) decide the limits of the immunity.⁹⁶

Linked to *Albany* there is also the question about a possible ‘labour exemption’ from competition rules. It would obviously cover, next to Article 81, also Articles 82 and 86(1) EC (Article 86(2) I discuss in the second chapter). Does *Albany* justify concluding that a more general ‘labour exemption’ from EC competition rules exist or shall we confine ourselves to an *in casu* approach? The question normally arises between national labour legislation and EC competition rules because it is difficult to imagine EC secondary legislation being challenged by virtue of the Treaty’s competition rules while it is in theory possible. Another aspect is how vigorously the competition argument is perhaps presented, lobbied and accepted as a counterargument against new EU labour legislation. However, I recall that in particular *Becu* and *Deutsche Telekom v Schröder* hint towards a ‘labour law exemption’. If collective agreements are granted an exemption (conditioned immunity), why not, if not *a fortiori*, granting the same status to proper state acts, i.e. legislation. In principle restrictions of or at least effects on competition are in labour legislation inherent but naturally much more variable than in sectoral collective agreements. Furthermore, the nature and purpose test applied in *Albany* (implying a safety valve against masked protectionism) looks suitable to legislation as well. Are there relevant counterarguments against the application of *Albany* this way by analogy? There are not, that I can see. With these reservations I may conclude that a ‘labour law exemption’ looks to be well justifiable by analogy with *Albany*, as supported by *Becu* and *Deutsche Telekom v Schröder*. Caution needs to be applied to analogous interpretations and this suggests that we should not forget the *in casu* approach.

Ultimately, I recognise, of course, the ‘competition connection’ in individual employment contracts (with its national regulations) but since EC competition rules only concern agreements between undertakings I will take the liberty to leave this issue for others to address.

The question remains why we do not find in *Albany* a single word about the alleged/possible fundamental social right to collective bargaining.⁹⁷ I will make some necessary remarks here. I recall how AG Jacobs found that among the international legal sources solely Article 6 of the European Social Charter seemed expressly to recognise its existence (paragraph 146 of the opinion). However, AG Jacobs quoted,

⁹⁶ See footnote 23, *supra*.

⁹⁷ The pension funds, the Dutch and French governments and the Commission argued in *Albany* in favour of such fundamental right in EC law, derived from ‘a number of international treaties’ as AG Jacobs expressed it (paragraph 132). The Preamble to the French Constitution recognises the right of workers to participate, via his representatives, in collective determination of working conditions.

next to the ‘menu nature’ of the ESC (paragraph 146), relevant judgments of the European Human Rights Court undermining – for him sufficiently – the binding effect of that right (paragraphs 148 to 156).⁹⁸ In so doing he passed over the conclusion of the Committee of Independent Experts, related to Article 5 ESC (right to organise), that ‘...where a fundamental trade union prerogative such as the right to bargain collectively was restricted, this could also amount to an infringement of the very nature of the trade union freedom guaranteed under Article 5’.⁹⁹ As to the ILO conventions, he pointed out (paragraph 147) that the ‘carefully drafted’ Article 4 of the Right to Organise and Collective Bargaining Convention No. 98 grants no right and, thus, he left without attention the fact that the ILO Committee on Freedom of Association has recognised in the monitoring practice of Convention No. 87 that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association.¹⁰⁰ He further found that in Germany

⁹⁸ AG Jacobs discussed (paragraphs 146 to 156 of the opinion) cases *Swedish Engine Drivers' Union v Sweden*, 6 February 1976, Eur. Court HR Rep., Series A, 20 (1976); *National Union of Belgian Police v Belgium*, 27 October 1975, Eur. Court HR Rep., Series A, 19 (1975); and *Gustafsson v Sweden*, 25 April 1996, R.J.D., 1996-II, No 9. The two first mentioned concern Article 6 ESC. In the first one the ECtHR said that that ‘the Charter does not provide for a real right to have any such agreement concluded’. In the second one the ECtHR held that the Charter does not provide for a real right to consultation with the state as employer. Neither statement negates the fundamental value of collective agreements concluded in relation to competition rules. Case *Gustafsson* concerned only the ECHR where the ECtHR did not take any definite stand on the right to bargain collectively but had recourse to the ‘wide margin of appreciation’ accorded to the state parties (see paragraph 156 of the opinion).

⁹⁹ The conclusion is quoted by Lenia Samuel, *Fundamental social rights; Case law of the European Social Charter*, 2nd ed., Council of Europe Publishing 2002, p. 121. This conclusion, concerning Ireland, she describes as ‘well established’ and denotes (*ibid.*) that ‘[s]ituations criticised under Article 5 on this basis for violations of the right to bargain collectively include, in addition to that of Ireland, those of Denmark, Malta, Norway and the United Kingdom’. She further mentions, under the heading of ‘The link between Article 5 and Article 6 para. 2’ (*ibid.*, p. 139) how ‘[a]ccording to the case law of the Committee [of Independent Experts on the European Social Charter], paragraph 2 of Article 6 “presupposes the guarantee of a complete freedom to organise” (Conclusions IV, p. 46, Ireland)’. Already earlier (Conclusions III, p. 35, concerning Ireland) the Committee had concluded that the incompatibility with Article 5 also extended to the right to bargain collectively provided for under Article 6 para. 2. Conclusions VI, p. 36, for their part read as follows: ‘a precondition of satisfactory compliance with the obligations arising out of Article 6 para. 2 was full observance of Article 5’. The conclusion of Lenia Samuel is that the interdependence of trade union rights and collective bargaining is ‘fully established’ (*ibid.*, p. 141). Sulkunen has also concluded, on the basis of the conclusion quoted by Lenia Samuel on her p. 121, that the contents of Article 5 ESC have been also elaborated to cover the right to collective bargaining; Olavi Sulkunen, *Kansainväliset Ammattiyhdistysoikeudet*, Helsinki 2000, p. 495. More recently the Committee (nowadays called the European Committee of Social Rights) has described the Irish situation (*i.a.*), as follows: ‘[t]he Committee has consistently found the negotiation license system to amount to an impairment of the right to freedom of association, since the statutory criteria for granting the license are excessive’; Conclusions XVI-1 Vol. 1, p. 346. Conclusions 2004 Vol. 1, p. 263, repeat substantively the same. It is impossible, indeed, to avoid the conclusion that AG Jacobs discussed a wrong Article, thus Article 6 instead of Article 5 ESC.

¹⁰⁰ See Digest of Decisions of the Committee on Freedom of Association, available via <http://www.ilo.org/ilolex/english/digestq.htm>, paragraph 782: ‘The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom

the Basic Law (Article 9(3)) grants constitutional protection to collective bargaining and agreements but passed over the fact that of the then 15 Member States the constitutions also in Belgium, France, Greece, Italy, Portugal and Spain accorded similar *direct* constitutional protection and at least in the Netherlands' monistic system similar although indirect protection is recognised via the international agreements, notably by the ILO Constitution. Further indirect protection normally stems from freedom of association guaranteed in every constitution.¹⁰¹ Despite these elementary aspects the conclusion of AG Jacobs was that there was not convergence enough of national legal orders and international legal instruments on the recognition of a specific fundamental right to bargain collectively (paragraph 160). I come back to the national constitutional traditions at the end on this section.

The ECJ avoided the whole issue since it decided *Albany* on the basis of an effective and consistent interpretation of the provisions of the Treaty as a whole. In any case it is clear that the Court did not confirm the position of AG Jacobs that there would not be convergence enough in the national legal orders and in international instruments for the recognition of a fundamental right. The Court avoided any stocktaking thereon. Furthermore, while the reasoning in *Albany* in paragraphs 52 to 60 (or to 64) *prima facie* looks fully free-standing, it was strong vis-à-vis the AG in the sense that the judgment (in paragraph 59) rejected the AG's concept of (and conclusions based on) there being also in a collective labour agreement an implied agreement between the negotiating employers in the sense of Article 81 (paragraphs 237 to 244 of the opinion). The Court upheld a traditional labour law notion of a collective agreement, its core being the contractual tie *between* the negotiating parties, not *inside* the parties. Another position of the AG from which the Court crucially distanced itself was that collective agreements would deserve protection in EC law only under the general principle of freedom of contract (paragraph 161 of the opinion). It is notorious that competition rules quash normal (even informal) contracts (and even concerted practices) on a daily basis. Thus, as such, *Albany* meant setting up the immunity of collective agreements in relation to competition rules that are 'fundamental for the Community' (see judgment *Eco Swiss*, at footnote 2, *supra*). Getting immunity (even a conditioned one) against such a legal feature justifies one in concluding that collective bargaining in itself is of fundamental value, thus it is also a Judge-made (de facto) fundamental right in the EU.¹⁰²

of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes.' It is impossible, indeed, to avoid the conclusion that AG Jacobs discussed a wrong ILO Convention, thus No. 98 instead of No. 87. Likewise Sulkunen, Ammattiyhdistysoikeudet Euroopan yhteisön oikeudessa, Työoikeudellisen yhdistyksen vuosikirja 1999-2000, p. 171-172.

¹⁰¹ See e.g. Stefan Clauwaert et al. (eds.), *Fundamental Social Rights in the European Union. Comparative Tables and Documents*. Report 82, European Trade Union Institute 2003; and the national reports in Bruun & Hellsten (eds.) *Collective Agreements and Competition Law in the EU*, DJØF Publishing, Copenhagen 2001.

¹⁰² See the identical position of Sulkunen, too, at footnote 80, *supra*. After closing the manuscript the author found Stefano Giubboni's 'Social Rights and Market Freedom in the

Regarding the issue of the lack of an express fundamental right to collective bargaining in *Albany*, the legal landscape includes certain vagueness which for its part may explain the lack of a reference to a fundamental right. First, the language of the ILO Constitution¹⁰³ and its Convention No. 98 is slightly programmatic and AG Jacobs left without attention the fact that in the ILO the right to collective bargaining derives from freedom of association (Convention No. 87; see the comments at footnote 100, *supra*). On the other hand, the judgment and the Opinion – paragraph 132 – do not reveal if the ILO Constitution and Convention No. 87 were expressly invoked in the case. Second, the European Social Charter has a certain subservient status¹⁰⁴ in relation to the ECHR, linked to the somewhat arguable and in this issue

European Constitution’, Cambridge University Press 2006. Some basic comments are anyway necessary. Thus, Giubboni finds that the Court in *Albany* would have excluded ‘fully in harmony with the restrictive approach’ of AG Jacobs the existence in the Community legal order of a fundamental right to bargain collectively. This casts “a shadow of worrying uncertainty over the nature and extent of the ‘immune’ area of collective autonomy”. This further brought back the image of a rigidly ‘functionalized’ collective bargaining; see Giubboni, pp. 203-4. The certain uncertainty (‘social policy objectives’ or ‘working conditions’ defining the limits of the immunity) I also recognise while I disagree with the Court being allegedly ‘fully in harmony’ with the AG, see my explanation above on the difference between the approaches of the AG and the Court (there are other methodological differences as well). I therefore have to also disagree with Giubboni’s conclusion that the contents of the immunity would be therefore essentially limited by the restrictions proposed by the AG (in paragraph 194 of the opinion): agreements on core issues, made in good faith and ‘without directly affecting the market in products and services’ (the last citation by Giubboni; AG Jacobs spoke about affecting ‘third markets and third parties’; these restrictions are not in the judgment but the nature and purpose of the agreement concerned).

¹⁰³ The Philadelphia Declaration, paragraph III: ‘The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: (e) the effective recognition of the right of collective bargaining...’. Article 4 of the Right to Organise and Collective Bargaining Convention (No. 98) reads: ‘Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’ In the Convention No. 87 the protection for collective bargaining (see footnote 100, *supra*) is based on the organisations’ right to organise their activities and to formulate their programmes (Article 3(1)). Effective recognition of the right to collective bargaining also includes in the 1998 ILO Declaration on Fundamental Principles and Rights at Work (paragraph 2(a)). On these ILO provisions, also see sections 4.4.2, 4.5, 4.6 and 4.7 of Hellsten 2006.

¹⁰⁴ The language of the ESC is stricter: ‘Article 5 – The right to organize. With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.’

even negative reasoning of the ECtHR. Again, the judgment and the Opinion do not reveal if Article 5 ESC was invoked. Furthermore, a discourse on fundamental rights would have perhaps included a careful and detailed assessment of the status of such a right at the national level, which might also have embodied laborious problems for the Court. A way out, besides pushing the developments of EC's own social law, was to reason only at the level of the EC Treaty, interpreting it effectively and consistently as paragraph 60 of *Albany* states.¹⁰⁵ The outcome in the judgment means a de facto superiority, tied up to Article 2 EC ('effective and consistent interpretation provisions of the Treaty as a whole'), of the social values over competition values whereas the paradigm of the AG was a neutral balance between rules of a priori the same rank (paragraph 179 of the opinion), followed then by the additional immunity criteria of 'good faith', core issues like wages and working conditions and the requirement of no effect on third parties and markets (paragraph 194 of the opinion).

Had the Court been obliged to apply the Treaty of Amsterdam – the factual events concerned occurred in early 1990s – it would have been difficult, if not impossible, to avoid taking stock in the judgment also on the 1989 Community Charter of Fundamental Social Rights of Workers¹⁰⁶ and the European Social Charter. In this sense, the issue might return in future on the desk of the Court, in a context also involving collective bargaining and free movement rights.

The 1989 Community Charter is at this point strongly bound by national law and practice. It, however, recognises that the employers or employers' organisations, on the one hand, and workers' organisations, on the other hand, shall have the right to negotiate and conclude collective agreements, thus under the conditions laid down by national legislation and practice. The European Social Charter is stronger (see footnote 104). As such, some EU Member States have acceded to the Community after having ratified Articles 5 and 6 of the European Social Charter. For that part the

'Article 6 – the right to bargain collectively. With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake' 1. to promote joint consultation between workers and employers; 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;...'.¹⁰⁵

¹⁰⁵ Giubboni has asserted that recognising a fundamental right to collective bargaining in *Albany* would have been 'capable of overturning, and reversing, the methodological perspective expounded by Advocate General and ultimately adopted by the Court'; it would have also meant, writes Giubboni, a total inapplicability of competition rules; see Giubboni, footnote 102, *supra*, p. 211. A page further he, too, however, admits that within a very narrow margin exceptions to this inapplicability would be acceptable in the general interest. I maintain that in practice the effect of the *Albany*-immunity is nearing the same: the purpose test allows the court to outlaw exceptionally (so far only theoretically) a distortion of competition masked by a collective agreement. This scope is really narrow. The methodological differences between the AG and the judgment I have described on p. 30, *supra*.

¹⁰⁶ Article 12, first paragraph of the Charter reads, as follows: 'Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.'

Social Charter falls under Article 307(1) EC and therefore binds the Community as a prior international agreement. Otherwise the EU Member States have ratified Articles 5 and 6 of either the original or the revised European Social Charter, with the exception of Austria, Luxembourg and Poland regarding Article 6 and Greece which has left Article 5 and 6 non-ratified (there are further reservations by other Member States regarding Article 6(4) ESC, irrelevant now). Even in Greece Article 22 of the Constitution refers to collective labour agreements and Article 23 guarantees the unhindered exercise of rights related to the freedom to unionise. Since Article 5 ESC is the crucial one here, it is therefore justified to find – unlike AG Jacobs in *Albany* – that by virtue of Article 307(1) EC and general international law the right to collective bargaining, included in Article 5 (and 6) ESC and in the ILO Convention No. 87, and established by the ILO Constitution as ‘the effective recognition of the right to collective bargaining’, also binds the EU as a fundamental right.¹⁰⁷ The result would be rather the same as asserting that in *Albany* the Court de facto established a Judge-made fundamental right to bargain collectively. The 1989 Community Charter naturally supports such an outcome (on the effect of the EU Charter of Fundamental Rights, see below).

Furthermore, the overall human or fundamental rights developments within the EU are in harmony with such an outcome, i.e. recognition of the right to collective bargaining as a fundamental right in the legal order of the EU. The most recent landmark in those overall developments is judgment *Cresson* in which the ECJ de facto applied certain provisions of Protocol No. 7 to the ECHR, although following the expression ‘even if it be accepted that [the provision first invoked by Mrs. Cresson] applies’. Materially they related to the rights of defence and effective judicial protection in a case concerning breaches of the obligations arising from the office of a Member of the Commission and a partial deprivation of the right to a pension.¹⁰⁸ Human rights intruded into the heart of the Community, i.e. into its internal disciplinary order. To show the overall development characteristics in *Cresson* I refer to judgment *Unborn Children (Grogan)* of 1991 where the Court passed over freedom of expression by delineating the reach of community law via a ‘*homo economicus*’ explanation on the EU’s competence. In that case it was limited by an internal market connotation of the free provision of services that was capable of covering the abortion

¹⁰⁷ I rhetorically recall that all the EU Member States have acceded to the ILO before access to the EEC/EU. The ECJ has recognised the binding effect of general international law especially in cases C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9, and C-162/96 *Racke* [1998] ECR I-3655 paragraph 45. On the binding effect in EC law of general international law regarding the right to strike, see Hellsten Jari, On the Social Dimension in Posting of Workers, Publication of Labour Administration (Finland) 2006 No. 301 (Hellsten 2006), section 4.6. As to detailed descriptions of the subject ‘EU and international law’, see e.g. Christiaan Timmermans, The EU and Public International Law, 4 European Foreign Affairs Review (1999) pp. 181-194, and Koen Lenaerts and Eddy De Smijter, The European Union as an Actor in International Law, 19 Yearbook of European Law (1999-2000), pp.122-126. - Given the extensive opinion of Advocate General and its lack of any reference to Article 307(1) EC and to the binding effect in EU law of international agreements by virtue of case-law, it is obvious that these arguments were not presented at all in *Albany*.

¹⁰⁸ Case C-432/04 *Commission v Cresson*, judgment of 11.7.2006, nyr, paragraphs 112 and 113.

but incapable of protecting the speaking and informing thereof.¹⁰⁹ In contrast to *Grogan*, *Cresson* reflects a modern universalism of human or fundamental rights. That universalism by definition also covers social and labour law.

From today's perspective the status of the right to collective bargaining as a fundamental right in EU law derives directly from the Charter of Fundamental Rights of the European Union (the EU Charter), proclaimed solemnly in Nice 2000. Its Article 28 (Article II-88 in the Constitutional Treaty) recognises that 'Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels'. In the form of a 'public subjective right' it is intended to guarantee a minimum standard in the exercise of the right to work.¹¹⁰ Notoriously the Charter is nowadays not a binding legal instrument but it is nonetheless a valid source of interpretation of law as the recent judgment of the Court in *Parliament v Council* shows.¹¹¹ The EU Network of Independent Experts on Fundamental Rights, established by the Commission, has characterized the Charter, as follows: 'the Charter also constitutes a catalogue of common values of the Member States of the Union. In that respect, the Charter may be taken into account in the understanding of Article 6(1) EU, to which Article 7 EU refers. [...] the Network considers the Charter as the most authoritative embodiment of these common values, on which its evaluation therefore may be based.'¹¹² Collective agreements are a pivotal part of the *industrial* democracy covered by 'democracy' in Article 6(1) EU.

The EU Charter in general terms puts social and labour rights, in this case the right to collective bargaining including the conclusion of agreements, on an equal footing with the economic rights and principles of the Community, thus it further supports and strengthens the outcome in *Albany*. The most likely outcome would, in a corresponding case today, be to establish the immunity of collective agreements on the basis of that fundamental right. The essence of the recognition of collective bargaining as a fundamental right is that restrictions to that fundamental right in any case cannot and shall not impair its substance.¹¹³ On the other hand, the Charter is also a reflection of the constitutional traditions of the Member States and, indeed, the right to collective bargaining and agreements enjoys constitutional protection in a relevant number of the Member States and in the sense of Article 6(2) TEU. Namely,

¹⁰⁹ Case C-150/90 *The Society for the Protection of Unborn Children Ireland Ltd v Grogan* [1991] ECR I-4685; on this judgment see Hellsten 2005, section II.2.3.

¹¹⁰ See Xenophon I. Contiades, Social Rights in the Draft Constitutional Treaty, in: Ingolf Pernice/Miguel Poiares Maduro (eds.): *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*. Nomos 2003, p. 71. As to the Charter in more general terms, also see Hellsten 2006, section 4.4.6.

¹¹¹ See case C-540/03 *Parliament v Council*, judgment of 27.6.2006, nyr, paragraphs 38, 58 and 59.

¹¹² The report is available via <http://europa.eu.int/comm/justice_home/index_en.htm> or with reference 'CFR-CDF.Conclusions.2004.en'; citation from p. 9. Article 6(1) TEU includes the founding legal principles of the Union: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles common to the Member States.

¹¹³ See case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659, paragraph 80. On this judgment, also see Hellsten 2006, section 4.10.1, pp. 118-121.

next to numerous ‘old’ Member States (Belgium, France, Germany, Greece, Italy, Portugal and Spain), express references to collective bargaining and/or agreements are also in the constitutions of Cyprus, Latvia, Poland and Slovak Republic. Next to this, in the Netherlands (Articles 93 and 94 of the Constitution) and the Czech Republic (Article 10 of the Constitution) the monistic system gives the international human rights treaties, in this case especially the ILO Constitution, as refreshed by the 1998 ILO Declaration on Fundamental Principles and Rights at Work, a directly binding force, thus also protecting collective bargaining and agreements. As such, the ILO Constitution naturally binds, as mentioned, every EU Member State as a prior international agreement under Article 307(1) EC. Summing up, this means a direct constitutional protection for collective bargaining and agreements in a relevant number of Member States, as supported by the international law protection. Finally, indirect constitutional protection of collective bargaining and agreements may flow especially from freedom of association (guaranteed by every constitution within the EU), more precisely from the liberty to form trade unions and from their freedom of operation.

Chapter II

Social Services of General Interest; Article 86(2) EC

2.1. General Remarks

I discuss services of general interest (SGI) in this paper by keeping my eye mainly on elements that are important for social security systems while I also deal with the possible justification of the Finnish earnings-related pension scheme TEL under Article 86(2) EC. I do not embark on any discussion of the political or economic desirability, status or privatization of the SGIs but try to keep a strictly legal approach. A background factor is that the Treaty is formally neutral as to ownership relations in the Member States (Article 295 EC), i.e. it privatizes nothing. Another issue is what the European Commission (and the Member States) have done in conducting their liberalisation policy within public utilities.

Article 16 EC nowadays enshrines a principal recognition of SGIs in the EC legal order, by referring to principles and conditions which enable them to fulfil their missions. Still, no positive definition of SGIs is included in the Treaty. In practice they have found their home in Article 86(2) according to which

Undertakings entrusted with the operation of *services of general economic interest* or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community. (italics added)

2.2 Economic Activities and Undertaking

The notions of ‘economic activities and ‘undertaking’ form the basis for the scope of Article 86(2). As enshrined in Article 2 EC, the Community has as its task ‘a harmonious, balanced and sustainable development of *economic activities*’ (emphasis added). This statement also forms the basis for the competence of the Community, and thus the reach of EC law, competition rules included.¹¹⁴ Regarding the term ‘economic activities’, it is enough to state here that *prima facie* some surprising activities fall under ‘economic’. Almost any activity involving remuneration is regarded as ‘economic’. Even *quid pro quo* (payment in kind) in a religious society may be covered by ‘economic’,¹¹⁵ as is prostitution.¹¹⁶ It is sufficient that it involves

¹¹⁴ In my publication On the Social Dimension in Posting of Workers, Publication of Labour Administration 2006/301, Ministry of Labour, Finland, p. 83, I have drawn the conclusion that these overarching ‘economic activities’, as enshrined in Article 2 EC, finally lead to apply the Treaty rules to industrial action, too, in the internal market although Article 137(5) EC strongly suggests that we cannot expect EC directives (under that Article) in the field concerned.

¹¹⁵ See Case *Steymann* C-196/87 [1988] ECR 6159.

‘genuine’ work and there is some remuneration. For this reason even the normal activities of a public hospital fall under economic activities.¹¹⁷ In the more general Community jargon the definition runs as follows:

‘...any activity consisting in offering goods and services on a given market is an economic activity.’¹¹⁸

Thus, offering goods and services to a given market forms the concept ‘economic activity’. Given the broad interpretation of the notion ‘economic’ it is important to see that it is not unlimited: maintenance and improvement of air navigation safety,¹¹⁹ as well as protection of the environment¹²⁰ have been found to be non-economic public tasks. Similarly, national education falls outside economic activities.¹²¹ However, the broad maxim is that when the public authority, the state, engages in measures within ‘economic activities’, it also enters into the realm of competition rules.

¹¹⁶ See Case *Jany* C-268/99 [2001] ECR I-8615. We can see a too straightforward assertion about the social field in the recent Communication from the Commission, Implementing the Community Lisbon programme: Social services of general interest in the European Union; COM (2006) 177 final. The Commission first denoted (p. 6) on the basis of case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraph 16, how the Treaty does not require the service to be paid for by those for whom it is performed. From this it deduced that ‘[i]t therefore follows that almost all services offered in the social field can be considered “economic activities” within the meaning of Articles 43 and 49 of the EC Treaty.’ This conclusion lacks conviction above all due to the lack of a real market in many social cases. In any case this kind of broad conclusion ignores many special characteristics in the social field.

¹¹⁷ In *Smits and Peerbooms*, C-157/99, para. 58, the Court wrote: “Second, Article [50] of the Treaty states that it applies to services normally provided for remuneration and it has been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (*Humbel*, paragraph 17). In the present cases, the payments made by the sickness insurance funds under the contractual arrangements provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character.”

¹¹⁸ See the case Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7. In Case C-35/96 *Commission v Italy* [1998] ECR I-3851, the ECJ wrote: “37. The activity of customs agents has an economic character. They offer, for payment, services consisting in the carrying out of customs formalities, relating in particular to the importation, exportation and transit of goods, as well as other complementary services such as services in monetary, commercial and fiscal areas. Furthermore, they assume the financial risks involved in the exercise of that activity (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 541). If there is an imbalance between expenditure and receipts, the customs agent is required to bear the deficit himself.”

¹¹⁹ Case C-364/92 *SAT Fluggesellschaft* (‘Eurocontrol’) [1994] ECR I-43, paragraph 30: Taken as a whole, Eurocontrol’s activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.

¹²⁰ Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paragraph 23 where the public authority argument was used as in Eurocontrol, see the previous note.

¹²¹ See case 263/86 *Humbel* [1988] ECR 5365.

What is then an undertaking in the sense of competition rules and the Treaty in general? There is no definition *ipso jure* but it is well established in case-law since case *Höfner* where the Court defined it as follows:

21 It must be observed, in the context of competition law, ... that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...¹²²

This is the general and abstract definition that gives the basis throughout the sectors. However, in the field of social security the approach is essentially concrete, taking into account especially the possible non-profit-making nature of a scheme, the way it is financed (such as pay-as-you-go or capitalisation principle in pensions), various redistributive functions, i.e. existence of solidarity elements in the scheme, and the intensity of state control and rule-making. These aspects were developed further by the ECJ in *AOK Bundesverband* in 2004.

2.3 Case *AOK Bundesverband*

Hence, every entity engaging in economic activities can be an undertaking. In the case *AOK Bundesverband*¹²³ the ECJ first gave an overview of its case-law elaborating the notion of ‘undertaking’ and ‘economic activities’ regarding different social security bodies. As described in paragraph 47 of *AOK Bundesverband*,

...[T]he Court has held that certain bodies entrusted with the management of statutory health insurance and old-age insurance schemes pursue an exclusively social objective and do not engage in economic activity. The Court has found that to be so in the case of sickness funds which merely apply the law and cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits. Their activity, based on the principle of national solidarity, is entirely non-profit-making and the benefits paid are statutory benefits bearing no relation to the amount of the contributions (Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 15 and 18).

Thus, national solidarity, non-profit-making and statutory benefits without any relation to contributions paid were enough to exclude the scheme from economic activities. The Court then explained its reasoning (in paragraph 48 of *AOK Bundesverband*) in judgment *Cisal*,¹²⁴ as follows:

¹²² Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21. The Court continued in paragraph 22, as follows: ‘The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.’ This is what one may call a potential-private-activity test.

¹²³ Joined Cases *AOK Bundesverband* C-264/01 [2004] ECR I-2493.

¹²⁴ Case C-218/00 *Cisal* [2002] ECR I-691.

The fact that the amount of benefits and of contributions was, in the last resort, fixed by the State led the Court to hold, similarly, that a body entrusted by law with a scheme providing insurance against accidents at work and occupational diseases, such as the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (the Italian National Institute for Insurance against Accidents at Work), was not an undertaking for the purpose of the Treaty competition rules (see *Cisal*, cited above, paragraphs 43 to 46).

Hence, *Cisal* shows that the role of the state in deciding finally the benefits and contributions was of ultimate importance in assessing the body concerned. Advocate General Jacobs highlighted the same aspect. But ECJ went on by referring (in paragraphs 49 and 50 of *AOK Bundesverband*) to cases *FFSA* and *Albany* in which it decided to hold the social security bodies as undertakings engaged in economic activities:

On the other hand, other bodies managing statutory social security systems and displaying some of the characteristics referred to in paragraph 47 of the present judgment, namely being non-profit-making and engaging in activity of a social character which is subject to State rules that include solidarity requirements in particular, have been considered to be undertakings engaging in economic activity (see Case C-244/94 *Fédération française des sociétés d'assurance and Others* [1995] ECR I-4013, paragraph 22, and Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 84 to 87).

Thus, in *Fédération française des sociétés d'assurance and Others*, at paragraph 17, the Court held that the body in question managing a supplementary old-age insurance scheme engaged in an economic activity in competition with life assurance companies and that the persons concerned could opt for the solution which guaranteed the better investment. In paragraphs 81 and 84 of *Albany*, concerning a supplementary pension fund based on a system of compulsory affiliation and applying a solidarity mechanism for determination of the amount of contributions and the level of benefits, the Court noted however that the fund itself determined the amount of the contributions and benefits and operated in accordance with the principle of capitalisation. It deduced therefrom that such a fund engaged in an economic activity in competition with insurance companies.

What can be deduced from these passages? A non-profit-making and social character activity subject to state rules is no guarantee of a non-economic nature, *FFSA* tells us. The reasons – not all of them referred to in the cited para. 50 of *AOK Bundesverband* – were that membership in the scheme was optional, the scheme functioned upon capitalisation and benefits were tied to contributions. An implied possibility of competing with life assurance companies existed. As to *Albany*, self-determined contributions and benefits and capitalisation were enough, in spite of fund-wide solidarity features present, to push the sectoral pension fund with compulsory membership under economic activities, and consequently, to find it as an undertaking.

In *AOK Bundesverband* the case concerned the setting by the compulsory sickness funds in Germany of maximum amounts reimbursed for medicinal products. The ECJ counted its essential characteristics:

- Implementing a law-based social security scheme founded on national solidarity and fulfilling an exclusive social function;
- An entirely non-profit-making scheme;
- Identical obligatory benefits that do not depend on contributions paid;
- Equalisation of costs and risks between the funds on the basis of solidarity;
- The funds are therefore not in competition with one another or with private institutions as regards grant of the obligatory statutory benefits in respect of treatment or medicinal products which constitutes their main function.

With the above-mentioned grounds the ECJ considered the German sickness fund system equal to that in *Poucet and Pistre* and *Cisal*, thus not being of economic nature (paragraph 55 of *AOK Bundesverband*). This conclusion was equipped with an elementary completion. Namely the ECJ found that its conclusion was not negated by the fact that the national legislature had ‘introduced an element of competition with regard to contributions in order to encourage the sickness funds to operate in accordance with principles of sound management, that is to say in the most effective and least costly manner possible, in the interests of the proper functioning of the German social security system’; paragraph 56. Pursuit of the last objective did ‘not in any way’ change the exclusively social nature of the social security scheme. The conclusion was that the sickness funds did not engage in economic activities and were therefore not undertakings in the sense of Article 81 and 82 EC (paragraph 57).

Nevertheless, in *AOK Bundesverband* (paragraph 58) the ECJ left open the possibility that the sickness funds could be engaged in economic activities, thus when they resorted to ‘operations which have a purpose that is not social’. The judgment shows that this was not just an ultimate safety valve because the Court then discussed the conditions and procedure in fixing the maximum amounts (paragraphs 59 to 64). The crucial question was whether the activity concerned was ‘a specific interest separable’ from the social function of the scheme (paragraph 63). The conclusion was that the funds merely performed a task of management of the German social security system ‘which is imposed upon them by legislation and that they do not act as undertakings engaging in economic activity’ (paragraph 64). A further consequence was that any reasoning under Article 86(2) became unnecessary.

2.3.1 Some *AOK* Debate

As mentioned, it is elementary in *AOK Bundesverband* that, next to delimiting the basic notions of economic activities and undertaking, the ECJ also introduced the concept of an acceptable level of competition within social security schemes without that changing the basic nature of a scheme as a non-economic activity. This is also what Drijber¹²⁵ seems to find as the case’s novelty while he contends that the ‘split’ in the activities of a given entity was ‘somehow implicit’ in *Commission v. Italy*,¹²⁶

¹²⁵ See the case annotation of Berend Jan Drijber in CMLRev. 42:523-533, 2005, p. 528.

¹²⁶ Case 118/85 [1987] ECR 2599, concerning the Italian tobacco monopoly. I admit that I cannot find such an implicit ‘split’ in that judgment because it concentrated on the question

*Höfner*¹²⁷ and *Wouters*.¹²⁸ In *Höfner* a split is rather impossible to be seen while its language ('...any entity engaged in economic activities, regardless of its legal status and the way it is financed.') looks extremely condensed. In *Wouters* one can see a promise of a split at least in the sense that the ECJ – while it held that a national Bar forms an association of undertakings – used the requirements of proper practice (professional ethics) of the legal profession as a direct justification for a restriction of competition.¹²⁹

Belhaj and van de Gronden read *AOK Bundesverband* somewhat differently. They e.g. maintain that, following *FFSA* and *Albany*, a scheme should be regarded as an undertaking 'when a national legislator has opted for a mix between competition and solidarity.'¹³⁰ We have to admit that the outcome in *AOK Bundesverband* deviates from *FFSA* and *Albany* but that was due to a difference in the solidarity¹³¹ and competition elements present in the respective cases. Belhaj and van de Gronden further find the acceptance of a certain competition element as surprisingly not leading to the funds being regarded as undertakings. They even write that the point of

whether the monopoly was a separate legal entity subject to the transparency rules on financial transactions. It was subject to those rules even if it wasn't a separate legal entity.

¹²⁷ Case C-41/90 [1991] ECR I-1979.

¹²⁸ Case C-309/99 [2002] ECR I-1577. The case concerned the legality of a lawyer-accountant partnership. The ECJ upheld the Dutch ban thereon as to Members of the Bar. The Treaty competition rules are porous: the very scope of Article 81(1) is influenced by policy objectives located elsewhere in the framework of EC law and policy. Weatherill has indicated in the context of *Wouters* the interpretative link between competition rules and Articles 28 and 49: 'It is worth recalling that both Articles 28 and 49 on the free movement of goods and services respectively offer similar insight into the way in which the Court interprets EC trade law in a manner that seeks to avoid trampling other regulatory objectives underfoot. In fact an apparent convergence between the assumptions of EC law of free movement and EC competition law emerges from the ruling in *Wouters*. The Dutch rules prohibiting multi-disciplinary partnerships between members of the Bar and accountants were not only attacked as violations of Article 81 but also as violations of Articles 49 (ex 59) EC concerning the free movement of services...'. Stephen Weatherill, *Cases and Materials on EU Law*, 6th ed., Oxford University Press, 2003, p. 526.

¹²⁹ Drijber's last example, case T-313/02 *Meca-Medina*, judgment of 30 Sept. 2004, nyr, concerned a split in sports activities. The CFI held that doping control represented pure sporting values and thus fell outside economic activities. I agree, in principle, that the CFI delimited economic activities but that was under free provision of services. Full parallels are not justified with competition rules as the ECJ confirmed in its judgment of 18 July 2006 in case C-519/04 P *Meca-Medina*. The ECJ even found that the CFI erred in law when it did not determine specifically whether the contested doping rules fulfilled the requirements in Articles 81 and 82 EC but relied only on the assessment of economic activities; see paragraphs 30-34. As to the substance, the ECJ dismissed the appeal of *Meca-Medina* because it was not shown, rather the contrary, that the doping rules concerned do not 'go beyond what is necessary in order to ensure that sporting events take place and function properly'; paragraph 54. We thus have to learn that the ECJ finds itself competent to guard the limits of doping control under EC competition rules. Protests from the sport circles seem obvious. – The split thinking is well present in this judgment, confirming that excessive doping rules may turn to anti-competitive restrictions.

¹³⁰ Somaya Belhaj and Johan W. van de Gronden, *Some Room For Competition Does Not Make a Sickness Fund An Undertaking. Is EC Competition Law Applicable to the Health Care Sector?* *European Competition Law Review* 2004 p. 684.

¹³¹ Some 90% of wage-earners in Germany are covered by the scheme.

view of the Court ‘does not match’ the efficiency doctrine in competition law.¹³² More elaborate is to find – as did the Court – that the competition element (possibility to compete with the contributions) was introduced exactly to enhance efficiency and save costs. It is therefore difficult to see, indeed, how this could be in contradiction with the efficiency doctrine.¹³³

Wesseling rightly points out that after *AOK Bundesverband* one may find that – in classifying various bodies as undertakings – it is no longer decisive whether the activities of the organisation are ‘necessarily’ undertaken by a public authority (the Höfner test). Likewise, the manner of financing and the non-profit-making character of a body are nowadays relevant factors in the assessment.¹³⁴ The fact that the Court in *AOK Bundesverband* found the funds to be non-undertakings in spite of certain competition amongst them has, according to Wesseling, ‘complicated the picture further’. He finds it similar to a situation where the law excludes any competition. Both situations he finds to be expressions of a ‘rule of reason’, i.e. situations where – according to the ‘rule of reason’ principle – competition rules do not apply.¹³⁵ Unlike many other European scholars, Wesseling does not mean by a rule of reason a rule inherent in the US competition law embodying a comparison of anti- and pro-competitive effects of a measure, the latter emphasis leading to set aside competition

¹³² Ibid., Belhaj and van Gronden refer to Craig and de Búrca, *EU Law: Text, Cases and Materials* (3rd ed., 2003), pp. 936 and 937; and D.G. Goyder, *EC Competition Law* (4th ed., 2003), p. 9. The references are natural from the point of view of classical competition law thinking. On both sources the referred authors, however, present in brief – besides prior to *AOK Bundesverband* – the general principles of the competition law doctrine (in terms of Goyder: ‘allocative efficiency’, adjustment to consumer preferences, cost efficiency and productive efficiency) without any reasoning on social security schemes. Remarkably, e.g. Van Bael & Bellis, *Competition Law of the European Community*, 4th ed., Kluwer Law International 2005, p. 31, present *AOK Bundesverband* succinctly under general principles without any reference to a possible contradiction with the fundamental purpose of competition law.

¹³³ Belhaj and van de Gronden further submit that the Court would ‘probably’ have respected its own jurisprudence if it had followed the approach of Advocate General Jacobs. He acknowledged that it is difficult ‘...to arrive at any precise statement of the point at which the redistributive component of a pension or insurance scheme will be so pronounced as to eclipse the economic activities...’ (paragraph 35 of the Opinion). He anyway concluded that in fixing the maximum amounts the sickness funds acted as undertakings (paragraph 61 of the Opinion). Still, he firmly asserted that the scheme would be exempted from competition rules under Article 86(2).

¹³⁴ The leading case as to non-profit-making is C-70/95 *Sodemare* [1997] ECR I-3395. The Court ruled i.a. that Articles [81] and [82], read in conjunction with Articles 3(g), [10] and [86] of the EC Treaty, do not apply to national rules which allow only non-profit-making private operators to participate in the running of a social welfare system (old people’s home).

¹³⁵ Rein Wesseling, *The Rule of Reason and Competition Law: Various Rules, Various Reasons*, in Schrauwen (ed.) *Rethinking another Classic of European Legal Doctrine*, Europa Law Publishing, Groningen 2005, p. 66. Wesseling also points out that taking account of the economic context in which the undertakings operate and the structure of the market concerned have been labelled as a rule of reason. For Wesseling rule of reason means above all the room for national public policy concerns; *ibid.*, p. 60. However, he does not discuss rule of reason under Article 86.

rules.¹³⁶ The value of this ‘rule of reason description’ is somewhat disputable also regarding undertakings entrusted with measures of public interest.

In the German doctrine Koenig and Engelmann have held the distinctive question of the Court (whether there is an economic activity separable from the purely social function of the funds) also unclear. Namely, they assert that a social purpose of an activity taken as such is not against its qualification as an economic activity. This idea is impossible to share, given the extremely clear language employed by the ECJ in paragraph 58 of the judgment.¹³⁷ The ECJ operated with a dichotomy economic – social. However, Koenig and Engelmann further find that the judgment rather means to allow scrutiny under the notion of economic activities regarding any functions of a fund.¹³⁸ At this point I basically agree but highlight that the argumentation structure of the ECJ (main activities in relation to separable activities that are possibly under economic activities) means a *prima facie* shelter for the funds under the notion of social function or activities. This is easier to understand if we imagine the structure the other way round: the whole fund first qualified as an undertaking engaged in economic activities wherefrom we should distil separate social activities as an exception from competition rules. Into such a structure it would be impossible to introduce the idea of limited competition within a social security scheme.

Baquero Cruz has pointed out that the clear-cut definition in *Höfner*, with a potential-economic-activity test (the term is Baquero Cruz’s; is there a possibility for private activities), was not applied in *AOK Bundesverband*. The Court takes into account the nature of the activity, its aim and the legal framework to which it is subject. Besides, according to Baquero Cruz, ‘that legal framework may rule out the existence of an economic activity if the legislator has decided to exclude competition or to impose anticompetitive conduct in the general market.’¹³⁹ I fully agree with Baquero Cruz in the sense that with respect to social security schemes and institutions the *Höfner* test is only one factor in a more comprehensive assessment. The quoted further submission of Baquero Cruz refers to the notion of economic activities still as a concept of European law, even though the national legislator is the first decision-maker. However, the concept cannot be dependent on the decisions of national legislators (and Baquero Cruz manifestly does not mean anything like that); a national

¹³⁶ In case T-112/99 *Métropole* [2001] II-2459 the CFI found that there is no rule of reason in the application of Article 81(1) EC but only under Article 81(3) EC.

¹³⁷ Paragraph 58 of *AOK Bundesverband*: ‘However, the possibility remains that, besides their functions of an exclusively social nature within the framework of management of the German social security system, the sickness funds and the entities that represent them, namely the fund associations, engage in operations which have *a purpose that is not social and is economic in nature*. In that case the decisions which they would be led to adopt could perhaps be regarded as decisions of undertakings or of associations of undertakings.’ Italics by JH.

¹³⁸ Christian Koenig and Christina Engelmann, *Das Festbetrags-Urteil des EuGH: Endlich Klarheit über den gemeinschaftsrechtlichen Unternehmensbegriff im Bereich der Sozialversicherung?* In *EuZW* 22/2004, p. 684.

¹³⁹ See Julio Baquero Cruz, *Services of General Interest and EC Law*, in de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity*. Oxford University Press 2005, p. 184. As to the interpretation of Article 86(2) by Baquero Cruz, see section 2.5.8, *infra*.

monopoly may also engage in economic activities.¹⁴⁰ There are of course some *de minimis* issues, as well as the complete lack of the cross-border trade effect that may (already rather exceptionally) lead to the non-applicability of the Treaty rules.

Krajewski and Farley put the judgment into the context of a broader and ‘general trend in Community law and practice to respect and protect the intrinsic value of public services for the European social model vis-à-vis the unrestricted application of competition and state aid law.’¹⁴¹ They further point out that some might see in *AOK Bundesverband* a contradiction with the case-law concerning the freedom to receive health services abroad (free movement of patients).¹⁴² Namely, this case-law strongly emphasizes the economic character of health services whereas the *AOK Bundesverband* judgment points in a different direction. Krajewski and Farley rightly point out that the different approaches are not arbitrary but that they rather accommodate the different functions and objectives of market freedoms (freedom to receive services abroad) and competition law. The former concerns citizen’s rights, the ‘latter more an objective principle based on general policy decisions which the Court must balance against other policy objectives.’¹⁴³

In sum, in *AOK Bundesverband* the ECJ for the first time expressly declared a split in the application of competition rules to a social security scheme and made a clear basic distinction between economic and social (core) activities. Regarding the latter the funds did not act as undertakings. However, the fund as a social security entity was able to include an element of competition without losing its own basic nature as a social entity. Thus, in a controlled manner the Member States may introduce competitive elements in their social regimes without being obliged to step into the sphere of competition rules.¹⁴⁴ Judge Rosas has expressed as an overall qualification that *AOK Bundesverband* is an example of a situation where the EU Courts ‘leave room for national social policies, including the protection of social rights, of the

¹⁴⁰ In judgment C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14, the Court noted the possibility of even excluding any competition, if it is necessary for a service of general interest.

¹⁴¹ See Markus Krajewski and Martin Farley, Limited competition in national health systems and the application of competition law: the *AOK Bundesverband* case, (2004) 29 E.L.Rev., 849. Forrester, MacLennan and Komninos adhere to this view, also finding that the ‘judgment is a welcome clarification of the rather complicated case law in this evolving area. It certainly provides for a higher degree of immunity for national sickness funds from the Treaty competition rules, even if some residual competition exists between such funds.’ See Ian S. Forrester, QC, Jacquelyn F. MacLennan and Assimakis Komninos, EC Competition Law 2003-2004. Yearbook of European Law 24, Oxford University Press 2005, p. 556.

¹⁴² Ibid., p. 850. Krajewski and Farley refer to cases C-120/95 *Decker* [1998] ECR I-1831; C-158/96 *Kohll* [1998] ECR I-1931; C-368/98 *Vanbraekel* [2001] ECR I-5363; C-157/99 *Smits and Peerbooms* [2001] ECR I-5473; and C-385/99 *Müller-Fauré* [2003] ECR I-4509. Today this list would be prolonged by case C-372/04 *Watts*, judgment of 16.5.2006, nyr.

¹⁴³ See Markus Krajewski and Martin Farley, Limited competition in national health systems and the application of competition law: the *AOK Bundesverband* case, (2004) 29 E.L.Rev. pp.849-851.

¹⁴⁴ This is what Krajewski and Farley also share; *ibid.*, p. 850. They denote, however, that considerable legal uncertainty is created by the judgment while we do not know when there is sufficient competition to launch the application of competition law, p. 851.

Member States.’¹⁴⁵ One has also to underline the difference in the approach between the Court and the Advocate General who came to the conclusion that the sickness funds and their associations acted as undertakings in fixing the maximum amounts.¹⁴⁶ The Court respected the national social security system.

2.4 Case *FENIN*

An obvious further milestone in assessing “economic activity” and “undertaking” lies in the case *Fenin*.¹⁴⁷ The question at the heart of this case concerned the purchase of medical instruments by a public body responsible for the management of the Spanish national health system (“SNS”). Two issues are of particular importance. It was necessary, first, to establish whether the fact that the activity (medical treatment in hospitals) carried on by that body is subject to the principle of solidarity and thereby prevents it being classified as an undertaking and, secondly, whether it is possible to separate its purchasing activities from those of providing health services. The CFI found that the SNS acted as purchaser of medicinal products only to use them for a purpose of a ‘purely social nature’ (provision of free health care) and did not therefore act as an undertaking in a given market (paragraph 37). AG Poiares Maduro for his part found that the CFI erred in law while it resorted to this kind of global assessment and did not distinguish between the SNS’s activities. His main submission, however, was to refer the case back to the CFI in order to find the facts necessary to determine whether or not the activities of the organisations which manage the SNS are economic in nature; paragraph 57. He further found, on the basis of judgment *Smits and Peerbooms*, that provision of even free health care is of economic activity.¹⁴⁸ In the case that the provision of free health care had been regarded by the ECJ as a non-economic activity, it would have been necessary, according to the AG, to consider the first part of the ground of appeal, which challenges the connection made between the nature of the purchasing operation and the subsequent use of the goods acquired (paragraph 58 et seq.). For this part the AG concluded, basing himself on *Pavlov*,¹⁴⁹ *Eurocontrol*¹⁵⁰ and *Ambulanz Glöckner*¹⁵¹ that where purchase is linked to the performance of non-economic functions, it may fall outside the scope of competition law; paragraph 66.

¹⁴⁵ Allan Rosas, The Role of European Court of Justice in the application and interpretation of social values and rights, in Palola and Savio (Eds.), *Redefining the Social Dimension in an Enlarged EU*, Stakes, Helsinki 2005, pp. 197-198.

¹⁴⁶ In this respect also see section 2.7.2 *infra*.

¹⁴⁷ See case C-205/03 P.

¹⁴⁸ See the opinion of 10 November 2005, paragraph 52. For clarity’s sake it is to be noted that the AG refers to the application of Article 86(2) EC as a consequence (paragraph 55). As to *Smits & Peerbooms*, see footnote 117, *supra*.

¹⁴⁹ Joined cases C-180 to C-184/98 *Pavlov and Others* [2000] ECR I-6451. AG Poiares Maduro distinguished, as AG Jacobs and the judgment in *Pavlov*, between activities related to the medical practitioners’ economic sphere and activities related to their personal sphere. Only intermediate demand, in contrast to final demand, may be considered to belong to the economic sphere.

¹⁵⁰ Case C-364/92 *SAT Fluggesellschaft* (‘Eurocontrol’) [1994] ECR I-43.

¹⁵¹ Case C-475/99 [2001] ECR I-8089.

As these condensed remarks show, elementary aspects of EC competition law regime were at stake in *Fenin*. In its judgment of 11 July 2006 the ECJ, however, was very straightforward. It found, first, inadmissible (out of time) FENIN's plea that the medical services by the Spanish free health care system SNS would be of economic nature.¹⁵² Thus, the possibility of challenging a social system like the SNS on that ground remains. Second, the ECJ confirmed that 'undertaking' means any entity engaged in economic activities.¹⁵³ It then confirmed the position of the CFI in the definition of economic activities: they consist in offering goods and services on a given market and there is no need to dissociate purchasing activities, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity (paragraphs 25 and 26). In this case the subsequent use comprised according to the CFI only purely social activities (free medical treatment with a universal cover) which the ECJ did not deal with *ex officio*. The outcome naturally affects (reduces) – by this definition of economic activities - the number of potential candidates under Article 86(2) EC.

A couple of post-FENIN sentences are still needed on the notion of 'undertaking' in Articles 81, 82 (abuse of dominant position) and 86(2). Namely, as the wording in *Höfner*, paragraph 21 (...any entity engaged in economic activities, regardless of its legal status and the way it is financed...'), shows, organising some (mainly *economic*) activities in the form of a state monopoly is not a fully safe defence against competition rules if there is the possibility of competing private activities. This principle is visible e.g. in case *Commission v. Italy* of 1985, concerning the Italian tobacco monopoly.¹⁵⁴ On the other hand, *Höfner* and *Job Centre II*¹⁵⁵ show that neither are monopolies in the *social* field sheltered from competition rules if they are manifestly unable to satisfy the demand in the market.

2.5 Article 86(2) EC

2.5.1 General Remarks

Discussing Article 86(2) EC and the inherent concept of public services brings us back to the origin of the Community. The Spaak Report did not distinguish such public services but discussed only the '*Problème de monopoles*'.¹⁵⁶ Indeed, public services or such *obligations* were traditionally entrusted to state monopolies, corresponding to their special or exclusive rights under Article 86(1) EC. Accordingly, Article 86(2) EC was formulated as a derogation that is – in principle - subject to a narrow interpretation.¹⁵⁷ The Community was the European *Economic* Community.

¹⁵² Thus, the AG was more liberal in the admissibility issue, also referring to the fact that the issue was discussed before the CFI who also took stock on it; paragraph 22 of the judgment.

¹⁵³ The ECJ referred to *Höfner* and *AOK Bundesverband*.

¹⁵⁴ Case 118/85 *Commission v. Italy*, [1987] ECR 2599.

¹⁵⁵ On these judgments, see section 1.2.1, *supra*. As such, it is of course questionable how 'social' is the activity of an executive recruitment service.

¹⁵⁶ Spaak report : Comité Intergouvernemental Créé par la Conférence de Messine. Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères, 21 avril 1956, pp. 55-57.

¹⁵⁷ See e.g. case 127/73 *BRT v. SABAM* (BRT II) [1974] ECR 313, paragraph 19.

A path of evolution is also clear in the interpretation of direct effect of Article 86(2). In judgments *Hein* (1971) and *Inter-Huiles* (1983)¹⁵⁸ the Court stated (although ‘at this stage’) the lack of direct effect of Article 86(2). In *Cisal* the Court concluded (2002) that the provisions of Article 86(2) can be invoked by individuals before national courts in order to obtain a review of compliance with the conditions which they lay down. The Court drew its conclusion in particular on the basis of judgments *Corbeau*¹⁵⁹ and *Albany*.

One could be justified in seeing a turning point in judgments *Eurocontrol* (1994)¹⁶⁰ and *Poucet and Pistre* (1993)¹⁶¹ after which there is a new possibility that – in terms of Erika Szyszczak – ‘the competition rules could simply not be applied as regards certain activities which were in the general or public interest.’¹⁶² In *Eurocontrol*, paragraph 20, the Court stated that ‘it is in the exercise of...sovereignty that the state ensures...the supervision of their airspace and the provision of air navigation control services.’ Therefore an international organization such as Eurocontrol did not constitute an undertaking. In *Poucet and Pistre* the Court had to assess a compulsory social security scheme based upon national solidarity. Displaying language of a similar type one can see e.g. in judgment *Almelo* where the term ‘public service’ is used as a synonym of ‘services of general economic interest’.¹⁶³ Passing over many details one can submit that the concept of public services under Article 86(2) had undergone significant developments since the beginning of the Community, given the widespread scale of public services developed since the 1950s.

A manifestation of a certain new thinking is to be found today in Article 16 EC according to which

Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.¹⁶⁴

There are naturally different ways of reading this proviso. Prosser wants to see in it a ‘strong case to be made that the crucial change in attitude away from the market-

¹⁵⁸ Cases 10/71 *Hein* [1971] ECR 723 and 172/82 *Inter-Huiles* [1983] ECR 555, paragraph 15.

¹⁵⁹ See cases C-218/00 *Cisal* [2002] ECR I-691, paragraph 19; and C-320/91 *Corbeau* [1993] ECR I-2533.

¹⁶⁰ Case C-364/92 *SAT v. Eurocontrol* [1994] ECR I-43.

¹⁶¹ Joined cases C-159 and 160/91 [1993] ECR I-637.

¹⁶² Erika Szyszczak, Public Services in Competitive Markets. Yearbook of European Law 20, 2001 p. 42.

¹⁶³ Case C-393/92 *Almelo* [1994] ECR I-1520, paragraphs 30 and 31.

¹⁶⁴ Declaration No 13 annexed to the Final Act of the Treaty of Amsterdam clarified that Article 16 EC ‘shall be implemented with full respect for the jurisprudence of the Court of Justice, inter alia as regards the principles of equality of treatment, quality and continuity of such services’.

centred approach came with the adoption of the new Article 16...¹⁶⁵ Prosser, too, relies on Ross who has seen in Article 16 even a ‘critical step in the concretising of non-market (or post-market) concerns in both the psyche and legal hierarchy of legal development.’¹⁶⁶ Unlike Ross, Szyszczak highlights that Article 16 EC supports an expansive interpretation of Article 86 to bring even more state activity into the realm of the market-based rules of the Treaty.¹⁶⁷ Giulio Napolitano sees in Article 16 EC a legal principle ‘according to which the Community and the Member States are called to guarantee...the missions of general interest, without prejudice to the laws on competition and State aids.’ He also sees in it a possible U-turn (obviously vis-à-vis respect for market forces) ‘which would reveal the presence of a Community notion of services of general economic interest geared towards social cohesion.’¹⁶⁸ It would seem justified to suppose that this kind of definition would include a reference to a particular social task under Article 86(2) (explained below) but there is none. Mestmäcker has argued that, given the Declaration attached to it (see footnote 164), we may even disregard Article 16 EC.¹⁶⁹ Baquero Cruz concludes, as the author, that Article 16 (like Article II-96 of the Constitutional Treaty) is an element in the interpretation of Article 86(2), supporting (somewhat differing from the position of Szyszczak) a line that tries to strike a fair balance between market and public services values.¹⁷⁰ AG Poiares Maduro has held that Article 16 EC does not constitute a restriction on the scope of Article 86(2) EC, but instead provides a point of reference for the interpretation of that provision.¹⁷¹ Based on Article 16 EC Judge Lenaerts has held that public services have become an obligation both for the Community and its Member States, each within its limits of powers, and is even understood to be like one of the basic principles and objectives of the Treaty.¹⁷² In sum, it seems that a doctrinal mainstream sees in Article 16 EC a factor reinforcing the status of social activities under Article 86(2).

As to the meaning and interpretation of Article 86(2) EC, it seems to be typical for the European doctrine to pursue the reasoning only as far as the level of the utilities judgments of 23 October 1997, especially to *Commission v. Netherlands* therein. In that judgment the Court found how Article 86(2) seeks to

¹⁶⁵ Tony Prosser, Competition Law and Public Services: From Single Market to Citizenship Rights? *European Public Law*, 2005 Vol. 11, Issue 4, p. 553.

¹⁶⁶ Malcolm Ross, Article 16 EC and Services of General Interest: From Derogation to Obligation? 25 *European Law Review* (2000), p. 34. Ross concludes by stating that Article 16 is significant by articulating the value of services of general economic interest, by assuming a *communautaire* meaning for services and as a civilising force by enabling a further fleshing-out of the bones of citizenship to occur; p. 38.

¹⁶⁷ Szyszczak footnote 162, *supra*, p. 64.

¹⁶⁸ Giulio Napolitano, Towards a European Legal Order for Services of General Economic Interest. *European Public Law*, 2005 Vol. 11, Issue 4, p.566-567, footnote 5.

¹⁶⁹ See Ernst-Joachim Mestmäcker, Daseinsvorsorge und Universaldienst im europäischen Kontext: Ein Beitrag zur Funktion von Art. 90 Abs. 2 EGV, in Ruland, von Maydell and Papier (Hrsg.), *Verfassung, Theorie und Praxis des Sozialstaats: Festschrift für Hans F. Zacher zum 70. Geburtstag* (1998), p. 651.

¹⁷⁰ Baquero Cruz, footnote 139, *supra*, p. 177.

¹⁷¹ Opinion of 10.11.2005 in case C-205/03 P *FENIN*, endnote 35.

¹⁷² Koen Lenaerts, Les services d'intérêt économique général et le droit communautaire, in Conseil d'État, *Rapport public 2002 : Collectivité publiques et concurrence*, p. 427.

‘reconcile Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community’s interest in ensuring compliance with the rules in competition and the preservation of the unity of the Common Market.’¹⁷³

Thus, the orthodox expression ‘instrument of economic or fiscal policy’ was the flag of the ship. However, a new qualitative description with the necessary foundations came in *Albany*, paragraph 103, where the Court demonstrated that Article 86(2) encompasses particular economic or *social* tasks or policy instruments of the Member States. Therefore, before any in-depth reasoning on the details of the conditions applicable under Article 86(2), it is appropriate to establish the emergence of this umbrella concept.

2.5.2. *Albany*: Particular Social Task of General Interest¹⁷⁴

The Commission published in spring 2003 A Green paper on Services of General Interest.¹⁷⁵ The Green Paper did not mention the *Albany* judgement at all. Of particular significance was the lack of any reference thereto in the context of Article 86(2) EC, although *Albany* dealt with the basics of this Article, i.e. the demonstration of a notion of a particular social task of general interest as a distinct feature subject to Article 86(2). Furthermore, the same lack is in the subsequent (2004) White Paper on services of general interest.¹⁷⁶ Finally, the Commission communication on social services in 2006 continues the same path. See Communication from the Commission, Implementing the Community Lisbon programme: Social services of general interest in the European Union.¹⁷⁷ The neglect of any reference to *Albany* is particularly glaring in this communication, given that it stated how ‘social services do not constitute a legally distinct category of service within services of general interest’¹⁷⁸ and otherwise noted how various statutory and complementary social security schemes formed the other main category of services of general interest within the scope of the communication.

¹⁷³ Cases C-157/94 Commission v. Netherlands [1997] ECR I-5699, paragraph 39. The same formula was in judgment C-202/88 France v. Commission [1991] ECR I-1223, paragraph 12. This formula is the place of reference of e.g. Szyszczak, footnote 162, *supra*, p. 47.

¹⁷⁴ This presentation partially owes to Hellsten Jari, On the Legal Status of Public Services in the EU, Finnish Public Service Unions – FIPSU 2003; stencil; published by the Commission among the comments to the 2003 Green paper on the Public Services; http://ec.europa.eu/comm/secretariat_general/services_general_interest. The presentation here is both a streamlined and developed version.

¹⁷⁵ Green paper on Services of General Interest COM 2003/270 final. Neither did the Commission Staff Working Paper: Report on the Public Consultation on the Green Paper on Services of General Interest, 15.3.2004, SEC(2004) 326, mention *Albany*.

¹⁷⁶ COM(2004) 374 final.

¹⁷⁷ COM (2006) 177 final.

¹⁷⁸ *Ibid.*, p. 4.

I will briefly describe the basics in *Albany*.¹⁷⁹ Next to establishing the immunity of collective agreements in relation to competition rules, the Court held that the pension fund concerned was to be regarded as an undertaking as defined in the EC competition rules. However, the Court found that the exclusive rights in running the pension scheme, including e.g. the grant of exceptions, were justified under Article 86(2). The social factor was prominent in the case and also in the reasoning with respect to Article 86(2).

Therefore, it is of fundamental importance to explore the qualification ‘*social*’ in this context. I recall that the wording of Article 86(2) recognises that only particular services of general *economic* interest and fiscal monopolies are capable of enjoying this exemption from the Treaty provisions and in particular from the competition rules.

In earlier precedents the Court had emphasised how Article 86(2), as an exception, has to be interpreted narrowly. However, in *Albany*, at paragraph 103, the Court culminated its reasoning on the social effect within the ambit of Article 86(2). As a result it developed a modification of the traditional formula and stated how an instrument of economic or *social* policy is covered by Article 86(2) and is therefore capable of enjoying the exception, although always under the five other conditions explained below (see Section 2.7.1).

Thus, I here maintain that the Court elaborated or distilled a new notion under Article 86(2), namely that of a particular *social* task of general interest and a *social* policy instrument. *Prima facie*, ‘social’ would seem to fall outside the wording of Article 86(2), or that covering it by ‘general economic interest’ would be, indeed, *contra legem*. However, this is one of several focal points in the EC law dialogue, or sometimes ‘cold war’, between ‘economic’ and ‘social’. It appears, no more no less, that ‘general economic’ in the wording of Article 86(2) is under certain circumstances capable of encompassing even ‘social’.

2.5.3 Linguistic Aspect

In addition, there is also unfortunately a linguistic problem concerning paragraph 103 of *Albany*, which is crucial to the present argumentation. I will try to explain it as simply as possible. I would mention that paragraph 103 in the English version is the only version of *Albany* that is burdened by this kind of linguistic problem.

The English version of *Albany* that is published in the European Court Reports (ECR 1999 I-5751) uses in paragraph 103 the wording ‘instrument of economic or fiscal

¹⁷⁹ The expression *Albany* is used for the three parallel judgments of 21.9.1999 in the Cases C-67/97 *Albany*, C-115/97 *Brentjens* and C-219/97 *Drijvende Bokken*. In Bruun & Hellsten 2001, we focused on explaining the nature of the basic immunity of collective labour agreements in relation to competition rules but as a phenomenon of (mainly) private law (paragraphs 59-60 of *Albany*). We passed over the particular social task of general interest with a rather short explanation (see paragraphs 100-105, p.50-53). It is now appropriate to present a comprehensive explanation, especially for English-readers, since the English wording of paragraph 103 of *Albany* is liable to create misunderstandings, especially if read in isolation.

policy’ as does the Court’s web-site version too.¹⁸⁰ However, all the other language versions use the expression ‘instrument of economic or social policy’, instead of “instrument of economic or fiscal policy”. In French it is “*instrument de politique économique ou sociale*”, and in the language of the case, which was Dutch, “*instrument van economisch of sociaal beleid*”; and in German “*Instrument der Wirtschafts- oder Sozialpolitik*”. The relevant paragraph of the English version was obviously copied from the English versions of the two precedents referred to in Albany, paragraph 103. In these precedents, *France v Commission* and *Commission v Netherlands*, the previous standard (and Treaty) language: “economic or fiscal” was used. However, French is self-evidently authoritative in the decisions of the Court. Besides, the language of the case (Dutch in *Albany*) has an official status. The other linguistic versions, such as English, have no official status.

The conclusion to be drawn from the linguistic survey is that paragraph 103 of Albany has to be read and understood by reference to the Dutch, French and German etc. versions. This means that the expression ‘instrument of economic or social policy’ is the correct English translation and meaning in this context.

Immediately after *Albany*, an English-reader would clearly have had reason to wonder about the wording of paragraph 103 (‘instrument of economic or fiscal policy’) in the English version of the European Court Reports. The reasoning of the Court concerning the third question of the national court in *Albany*, 37 paragraphs in all, is quite marked by the use of the words ‘social’, solidarity etc. So it is strange that the word ‘social’ is not used in paragraph 103, which explains the law. Following the facts of the case and the reasoning of the Court, the word ‘fiscal’ does not make sense in this context. Was ‘social’ then a *lapsus* in this point, or did it result perhaps from a change in a draft where some passage(s) was(were) later dropped etc.? These questions are natural because the outcome of the case legitimised the Dutch *social* quasi-monopoly concerned.

On the other hand, paragraph 103, with the word ‘social’ (not ‘fiscal’), as in the French and Dutch versions, seemed to contradict the traditional principle of a narrow interpretation of an exception. This explanation is supported by the fact that paragraph 103 of Albany contained no reference to paragraphs 59 and 60 of Albany, in which the basic position, i.e. the conditioned immunity of sectoral collective labour agreements in relation to competition rules was concluded. Neither was any

¹⁸⁰ Paragraph 103 of Albany read as follows: “In allowing, in certain circumstances, derogations from the general rules of the Treaty, Article 90(2) of the Treaty seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market (Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 12, and Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 39).” (emphasis added) These precedents had nothing to do with social security schemes. The French case dealt with competition in the markets of telecommunication terminals equipment and the Dutch case concerned exclusive rights to import electricity for public distribution.

interpretation method demonstrated at this point as in paragraph 60 of *Albany* (effective and consistent interpretation of the provisions of the Treaty as a whole).

How to come through this linguistic jungle? The wording and meaning of paragraph 103 of *Albany* must also be read in the context of the Court's reasoning, which is set out in paragraphs 86 to 103 of the judgement. That is the authentic basis for understanding the reasoning about Article 86(2) EC in that judgement. Equally, this is the only solid way to understand the de facto new formulation regarding a Treaty rule promulgated. Paragraph 103 should not be read in isolation.

2.5.4 Contextual Explanation

The contextual starting point in explaining paragraph 103 of *Albany* is paragraph 86 which stated:

“Undoubtedly, the pursuit of a *social objective*, the above-mentioned *manifestations of solidarity* [inside the pension scheme - JH] and restrictions or controls on *investments* made by the sectoral pension fund may render the service provided by the fund *less competitive* than comparable services rendered by insurance companies. Although *such constraints* do not prevent the activity engaged in by the fund from being regarded as an *economic* activity, they *might justify the exclusive right* of such a body to manage a supplementary pension scheme.” (italics here)

Hence, the pension fund concerned, founded by a sectoral collective agreement between management and labour outside competition rules, was engaged in *economic* activities and consequently fell under competition rules as an undertaking.¹⁸¹ Article 86 is not mentioned here but that is the only place for the justification. The social constraints might justify the exclusive rights of the fund.

Further on, paragraph 98 of *Albany* formulated the final question to be answered under Article 86(2) EC, as follows:

“It is therefore necessary to consider whether, as contended by the Fund, the Netherlands Government and the Commission, the exclusive right of the sectoral pension fund to manage supplementary pensions in a given sector and the resultant restriction of competition may be justified under Article [86(2)] of the Treaty as a measure necessary for the performance of a *particular social task of general interest* with which that fund has been charged.” (italics here)

Thus, paragraph 103 of *Albany* was an intermediate normative reaffirmation of the question quoted. Furthermore, the social policy instrument introduced by paragraph 103 of *Albany* must be read in the context of paragraphs 104 and 105. The former made the link to objectives pertaining to the Member States' national policy and the

¹⁸¹ I pass here the criticism that obviously has its place regarding this decision.

latter referred to an 'essential social function within the Netherlands pensions system' that the pension scheme concerned had.

2.5.5 Origin of 'Particular Social Task' and 'Social Policy Instrument'

Hence, the purpose of Article 86(2), namely the performance of a particular task, but now elaborated as a particular *social* task of general interest, was presented in the final question as formulated in paragraph 98 of *Albany*. That question was a logical consequence of regarding the pension fund concerned as an undertaking under competition rules. However, no precedent was mentioned in the question because there was none with a social emphasis elevated into the text of a previous judgment as precisely linked to the interpretation of Article 86(2). Still, a question arises about the possible origins for inserting 'social' in Article 86(2). I have found the origin concealed in the Opinion of Advocate General Jacobs in *Albany*. He wrote, as follows:

'Article [86(2)] seeks to reconcile the Member States' interest in using certain undertakings as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the internal market. (210) Since it is a provision permitting derogation from the Treaty rules, it must be interpreted strictly. (211)' ¹⁸²

These two sentences merit some comments. Namely at this point also the AG referred to the earlier judgment *Commission v. Netherlands* that concerned exclusive rights to import electricity for public distribution.¹⁸³ However, the paragraph referred to in *Commission v. Netherlands* (number 39, in AG's endnote 210) after the AG's first sentence did not mention any social task but included the traditional reference to national economic and fiscal policy instruments. In that sense one has to conclude that the reference to a social policy instrument was an innovation of the AG which he did not justify further. The other passage in *Commission v. Netherlands*, referred to by the AG (paragraph 40, in his endnote 212), came closer to a 'social policy instrument' by asserting how the Member States were entitled to take into account 'objectives

¹⁸² See the Opinion of 28 January 1999, paragraph 436. – AG's endnote 211 referred to a classical narrow interpretation phrase in judgment *Commission v. Netherlands*. – A motive for discussing here the Opinion of AG Jacobs, too, in any greater length is e.g. in the presentation of Erika Szyszczak, Public Services in Competitive Market, Yearbook of European Law 20, 2001, p. 47 where she mentions but does not write out paragraph 436 of Jacobs AG. Instead, she writes out the older formula in case C-202/88 *France v. Commission* [1991] ECR I-1223, para. 12, that is identical ('economic and fiscal') with paragraph 103 of *Albany*, English version. The impression created by Szyszczak is confusing, I'm afraid, and seems to feed the impression that the formula in *France v. Commission* would still be that applied by the Court in *Albany* while she writes – in 2001 – nothing about paragraph 103 of *Albany*. Explaining paragraph 103 of *Albany* even with a 'wire model' is necessary, especially when Szyszczak also submits that '[t]he Court has interpreted Article 86(2) EC in a dynamic way, allowing for the concept of a service of general economic interest to adapt to technological change, societal values, and economic conditions'; *ibid.* Thus, the most dynamic step in the interpretation, i.e. replacing 'fiscal' by 'social' in the description of Article 86(2) EC she passes over.

¹⁸³ Case C-157/94 *Commission v. Netherlands* [1997] I-5699.

pertaining to their national policy'. Still, the fact is that only in a few other places (paragraphs 42, 45, 55 and 63) did the judgment *Commission v. Netherlands* refer to electricity supply for the whole population 'in a socially responsible manner' as the phrase is used in the national law concerned. It is therefore justified to conclude that the social factor was clearly present in *Commission v. Netherlands* while it was not directly subject to an interpretation under Article 86(2) by the Court.

The second sentence of the quoted passage above of the AG is rather interesting in the sense that he – as was natural in the light of *Commission v. Netherlands* - referred to the strict interpretation of Article 86(2) while not remarking on any contradiction with the textually expansive interpretation (social policy instrument) declared in his previous sentence. The discrepancy is, of course, to a certain extent mitigated by the fact that a social policy aspect was present in the case *Commission v. Netherlands* via national law.

Screening the case-law with the phrase of a *particular social task of general interest* leads to no references before *Albany* (and its sister cases *Brentjens* and *Drijvende Bokken*). However, this does not negate the presence of the socially responsible electricity distribution in case *Commission v. Netherlands*. In this sense its presence as a ground in paragraph 103 of *Albany* is clearly appropriate. Anyway, it is difficult to avoid the impression that the question in paragraph 98 of *Albany* was somewhat teleological. In any case, the question in paragraph 98 and its normative reaffirmation in paragraph 103 seem to be in perfect harmony.

I may here also refer to Mestmäcker. He first asserted in 1998 on the basis of judgment *France v. Commission*, C-202/88, paragraph 12 (which did not spell out 'social') – without mentioning any particular further grounds - that Article 86(2) encompasses economic or social policy instruments.¹⁸⁴ He further asserted how 'general economic interest' becomes almost without exception connected to the cultural, social or other political interests or is even defined by them. The formal contradiction with the wording of Article 86(2) disappears when we take into account that the primary addressees of Article 86(2) are the undertakings who have to behave against their narrow undertaking interest in order to fulfill their public service task.¹⁸⁵ It is noteworthy that Mestmäcker presented his 'instrument of social policy' interpretation before *Albany*.

2.5.6 Meaning of the Court's Normative Assertion

The Court's normative assertion in English, as legitimated above (i.e. inserting instrument of *social* policy), in paragraph 103 of *Albany* meant the following:

In allowing, in certain circumstances, derogations from the general rules of the Treaty, Article [86(2)] of the Treaty seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on

¹⁸⁴ Mestmäcker, footnote 169, *supra*, p. 641.

¹⁸⁵ *Ibid.*, p. 645.

competition and preservation of the unity of the common market (Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 12, and Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 39).(underlining here)

How to resolve the on-going 'cold war' between economic and social in every language? A possibly simplistic but logical approach would be to note that the Court has taken earlier a very broad interpretation of 'economic activities' under the internal market rules. It is logical to take an equally broad interpretation of the phrase 'services of general economic interest' in the wording of Article 86(2) EC, and to conclude further that 'general economic interest' was characterised in this way, i.e. encompassing even 'social', by the Court in paragraph 103 of *Albany*. Besides, this phrase 'general economic interest' under Article 86(2) had in this very case its special social roots and characteristics: social objective, solidarity elements, non-profit-making and investment control linked to the pension fund. All these together resulted in a position which was less competitive than competing private insurance companies might have had. Anyway, the meaning of the phrase 'general economic interest' was so much in contradiction with the standard meaning of 'economic' in the context of the (legal) internal market (such as maximising profits or economic protectionism) that it certainly legitimised the use of the word 'social' *expressis verbis* when denoting the meaning of Article 86(2) EC in this context, as was done in paragraph 103 of *Albany*.¹⁸⁶

The evolutionary step in *Albany*, which was to demonstrate the 'instrument of social policy' as a justification under Article 86(2) EC, is not always easy to see.¹⁸⁷ E.g. Szyszczak in her article with its telling name Public Services in Competitive Markets, thorough as such, comes so close to see it that she asserts how

'[t]he Europeanization of public services has helped clarify some of the problems by dropping the confusing terminology of 'services of general economic interest'. In the Commission's Communications [¹⁸⁸] the use of the word 'economic' denotes the activity under scrutiny, rather than the interest which is being protected. Thus the confusion between 'aims' and 'means' is clarified...Under Article 86(2) EC it is the *objectives* of

¹⁸⁶ One may wonder what happened to fiscal in *Albany*, paragraph 103. My answer is that nothing happened with fiscal. The Treaty is and will be there, with fiscal monopolies constitutionally accepted, although subject to different political and social pressures.

¹⁸⁷ I rhetorically denote that e.g. Goyder, Craig and de Búrca, Giubboni (see footnote 100, *supra*), Van Bael & Bellis and Wyatt & Dashwood have not discussed the 'social policy instrument' in paragraph 103 of *Albany* at all. The last mentioned in their European Union Law, 4th ed., pp. 723-4, confine themselves to present the treatment of the exclusive rights in *Albany* as a prolongation of *Corbeau* and *Commission v. Netherlands* (C-157/94), thus highlighting the legal and factual possibility of fulfilling the public service task and the alleviation of those conditions, stated in paragraph 107 of *Albany*.

¹⁸⁸ Szyszczak here means the Commission Communication on Services of General Interest in Europe COM(96)443 final and Communication From the Commission on Services of General Interest in Europe COM(2000)580 final.

the ‘service of general economic interest’ which must be of a non-economic nature.’¹⁸⁹

Szyszcak means in her last sentence social policy objectives capable of justifying a derogation under Article 86(2) EC. The use of both ‘economic’ and ‘non-economic’ in the same definition (the last sentence in the above citation) manifests the outdated nature of the wording of Article 86(2) EC. However, Szyszcak refers to her evidence showing how “the division between ‘non-economic’ (or social activities) and economic activities is increasingly blurred.”¹⁹⁰ I *prima facie* agree with this. At the same time, Szyszcak’s reasoning proves the very helpful impact which cognisance of the ‘social policy instrument’ established in *Albany*, paragraph 103, has in interpreting Article 86(2) EC.¹⁹¹ The same witnesses in another way Gagliardi (also referred to by Szyszcak) who has asserted that there is no clear line dividing economic and non-economic activities since many state regulations contain both economic and non-economic reasons. As an example he refers to the fixing of drug (medicine) prices which ‘could be perceived either as an economic measure to reduce the national health budget or as a necessary measure to provide health care to the lowest earners’.¹⁹²

As a not at all problematic presentation (although as a short one) of issues around paragraph 103 of *Albany* I may refer to Durand, Lewis and van Raepenbusch. Writing in French they have been free from any linguistic hardship in paragraph 103 of *Albany*, have quoted it and bind it to paragraph 105 of *Albany* where the Court noted the essential social function within the Netherlands pensions system that the supplementary pension fund had. The statutory pension was of limited amount, calculated on the basis of the minimum statutory wage. On the basis of ‘instrument of

¹⁸⁹ See Szyszcak, footnote 162, *supra*, p. 69-70. Emphasis is original. Reference to the objectives of the public service comes close the assertion of Mestmäcker in the end of section 2.5.5, *supra*. The difference is of course that Mestmäcker has boldly asserted how Article 86(2) also encompasses social policy instruments and consequently solved the contradiction with the wording of Article 86(2).

¹⁹⁰ *Ibid.*, Szyszcak’s footnote 171. The Commission’s explanation of Article 86(2) is still based on the dichotomy ‘economic – non-economic’, see Communication from the Commission, Services of general interest in Europe; OJ C17, 19.1.2001, paragraph 28.

¹⁹¹ It seems to me that cognisance of the ‘social policy instrument’ establishment in *Albany*, para. 103, would also make Szyszcak’s argumentation more convincing in her debate with Tamara Hervey concerning the role of social solidarity. Namely, Hervey in her article Social Solidarity: A Buttress Against Internal Market Law? In Shaw (ed.), *Social Law and Policy in an Evolving European Union*, p. 31-47, explores the solidarity elements present in judgments C-70/05 *Sodemare* [1997] ECR I-3395, para. 27; *Albany*; C-120/95 *Decker* [1998] ECR I-1831, para. 21, and C-158/96 *Kohll* [1998] ECR I-1931, para. 17. Especially at pp. 44-47 she has doubts whether the social solidarity expressed so far by the Court is able to protect the national social (security) regimes against Internal Market rules. However, Szyszcak replies rightly by referring to the fact that the classification between economic and non-economic [like solidarity-bound – JH] is predicated upon outdated assumptions and is not a useful way of classifying market activity caught by EC rules; Szyszcak p. 68. If the starting point is a ‘social policy instrument’ or particular social task of general interest under Article 86(2) EC it is easier to see that the solidarity aspect is just one element in classifying an ‘undertaking’ and in justification under Article 86(2).

¹⁹² Andrea Filippo Gagliardi, United States and European Union antitrust versus state regulation of the economy: is there a better test? (2000) 25 E.L.Rev. pp. 372-3.

social policy’ they can without difficulties find how the Court in its pragmatic reasoning (in paragraphs 104 to 111) took into account the social function of the regime concerned, as well as the margin of appreciation that the Member States have in running their social security schemes.¹⁹³ On the other hand, reading and writing in French is no guarantee of seeing and/or discussing the social policy instrument of *Albany*, paragraph 103. As an example I may refer to the general competition law presentation by Marie Malaurie-Vignal. She presents only some other essential details: for the application of Article 86(2) it is not necessary for the viability of the service provider to be threatened (paragraph 107 of *Albany*); and the possibility of ‘good risks’ leaving a pension scheme (with spiralling negative cost effect) in the absence of exclusive rights of a pension fund (paragraph 108 of *Albany*).¹⁹⁴

Since the judgement of September 1999 in *Albany*, Advocate General Léger, referring to paragraph 103 of *Albany*, used in the case *Wouters*¹⁹⁵ and later in *Altmark*¹⁹⁶ the formula “...instrument of economic, fiscal or social policy...” but he, too, writing in French, had no objection concerning the contents and meaning of paragraph 103 in *Albany* and that was exactly the place of his reference. The same concerns Judge Lenaerts who in 2002 has described Article 86(2) as including the connotation of ‘instrument of economic, fiscal or social policy’ with paragraph 103 of *Albany* as his point of reference.¹⁹⁷

The outcome in paragraph 103 of *Albany* (instrument of social policy demonstrated) simply surmounted a textual or literal and isolated interpretation of ‘economic’ in Article 86(2) EC. It was no *lapsus* but it was a carefully considered and balanced Court judgement and a normative reaffirmation or answer to the Court’s own question in paragraph 98 of *Albany* on a particular social task of general interest that reflects the realities in society. It meant that the social task (the pension fund) was first located (forced, I might say)¹⁹⁸ under the ‘economic activities’ category (notion of undertaking and competition rules) but it later qualified as an independent potential candidate for the exception in Article 86(2). In this way the category of a particular

¹⁹³ Claire-Françoise Durand, Xavier Lewis and Sean van Raepenbusch, Les principaux développements de la jurisprudence de la Cour de justice et du Tribunal de première instance du 1^{er} août 1999 au 31 juillet 2000, Cahiers de droit européen 2001 nos 3-4, pp. 504-505.

¹⁹⁴ Marie Malaurie-Vignal, Droit de la concurrence interne et communautaire, 3^e édition, Armand Colin 2005, p. 43, and, for the latter aspect, p. 72.

¹⁹⁵ Case C-309/99 *Wouters* [2002] ECR I-1577. See the AG’s Opinion in *Wouters* of 10.7.2001, paragraph 162; the Court decided the case on different grounds (no infringement of the cartel prohibition etc. regarding the ban of lawyer-accountant partnership between members of a Bar of Advocates and accountants) and, hence, avoided any stock-taking on Article 86(2).

¹⁹⁶ See the first Opinion of Advocate General in *Altmark*, C-280/00, 19.3.2002, paragraph 80. The Court gave its judgement in *Altmark* 24.7.2003 but only on the basis of Article 92(1) on state aids.

¹⁹⁷ Koen Lenaerts, Les services d’intérêt économique général et le droit communautaire, in Conseil d’État, Rapport public 2002 : Collectivité publiques et concurrence, p. 427.

¹⁹⁸ Durand, Lewis and van Raepenbusch also find that it would have been ‘more functional’ to free in *Albany* the pension fund from competition rules directly by virtue of the solidarity aspects present, thus regarding it as falling outside the notion of ‘undertaking’; *ibid.*, p. 507. It is clear that freeing the fund under Article 86(2) gives the Court more room for sophisticated solutions.

social task of general interest and a social policy instrument under Article 86(2) EC was established in *Albany*.

This explanation also corresponds to the overall broad meaning of ‘economic’ in the Treaty as elaborated in case-law. As mentioned already, even *quid pro quo* in a religious society may be covered by ‘economic’,¹⁹⁹ as is prostitution²⁰⁰ and health care in public hospitals.²⁰¹ Regarding the *quid pro quo* it is enough that the activity is ‘genuine’ work and it is for remuneration. ‘General economic’ is therefore understood in a very broad way and in this particular case the term is capable even of encompassing ‘social’ under Article 86(2).²⁰²

Further in *Albany*, given the rule demonstrated in paragraph 103, the pension fund succeeded in the practical and special type necessity test under Article 86(2).²⁰³ The reasoning of the Court after paragraph 103, in paragraphs 104 to 111, was indeed a practical test of a particular social task of general interest. Its culmination point was the reasoning in paragraph 108 that accepted the fact that the *a priori* compulsory (*erga omnes*) membership safeguarded the solidarity aspect inherent in the rules on pension benefits, and moreover blocked any endangering of the fund’s existence.²⁰⁴

2.5.7 *Commission v. Spain*

A further, in fact the conclusive, step in the argument (in *Albany* a new, elaborated notion promulgated) is the judgement in the case *Commission v Spain*, given by the Court on 13 May 2003.²⁰⁵ It gave, concerning Article 86(2), the passage being a plain side path or argument in the case, the same explanation as in *Albany*, hence “instrument of economic or social policy”. The Court, sitting in a mini-plenum of 11 Judges, held:

82 “[...] the argument which the Spanish Government bases on Article 86(2) EC. In that regard, although it is true that paragraph (2) of Article 86 EC, read with paragraph (1) thereof, seeks to reconcile the Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument

¹⁹⁹ See Case C-196/87 *Steymann* [1988] ECR 6159.

²⁰⁰ See Case C-268/99 *Jany* [2001] ECR I-8615.

²⁰¹ Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 58.

²⁰² Similarly, if not identically, Baquero Cruz also finds that a narrow approach to the concept of economic activity would reduce the scope of application of Article 86(2). Baquero Cruz, footnote 127 *supra*, p. 185.

²⁰³ For this necessity-test (instead of a traditional proportionality test) see section 2.7.1, *infra*.

²⁰⁴ Paragraph 108 of *Albany* was worded as follows: “If the exclusive right of the fund to manage the supplementary pension scheme for all workers in a given sector were removed, undertakings with young employees in good health engaged in non-dangerous activities would seek more advantageous insurance terms from private insurers. The progressive departure of ‘good’ risks would leave the sectoral pension fund with responsibility for an increasing share of ‘bad’ risks, thereby increasing the cost of pensions for workers, particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities, to which the fund could no longer offer pensions at an acceptable cost.”

²⁰⁵ Case C-463/00 *Commission v. Spain* [2003] ECR I-4581, paragraph 82, in explaining Article 86(2) EC, following to an expressed (and deviating) position of the Spanish government.

of economic or *social policy* with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market (Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 12; and Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 39), it is none the less the case that the Member State must set out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised (*Commission v Netherlands*, paragraph 58).” (italics here)

Here there is a minor difference from *Albany* in that this time Article 86(2) is read together with 86(1) which then results in the requirement for the Member States to set out in detail the reasons for the exclusive rights concerned. Whether this is a real change or just a natural development in case-law, I need to set aside here. In any case, there is no linguistic problem this time. The use of ‘social’ was corroborated. If there is any problem with clarity, the lack of a reference to *Albany* might qualify. However, the landmark position on Article 86(2) taken in *Albany* was clearly confirmed by this new judgement and, accordingly, the ‘instrument of economic or social policy’ is now settled case-law.²⁰⁶ Finally, I would like to refer to the need to amend the Treaty to reflect appropriately the case-law as developed in *Albany*, hence also enshrining ‘social’ in the very wording of Article 86(2). The European political ‘machinery’ should understand the need to resolve this discrepancy between economic and social. The EU citizens deserve to have a Treaty that they understand, not least because of the fact that EC competition rules, Article 86(2) included, have direct legal effect in the Member States. EU citizens should be able to know the real contents of the EU law that they can invoke before national courts and authorities. They should be given the opportunity to know that ‘general economic interest’ no longer restricts the application of Article 86(2) and that it already covers social policy instruments. Thus, the Treaty should simply correspond to that case-law. However, it is telling that during the preparations of the Constitutional Treaty the author was unable to convince even the Finnish government about the need for such an amendment.

2.5.8 Concluding Remarks

After *Albany* and *Commission v. Spain* the question arises: which kind of social policy instruments are qualified under Article 86(2)? It would seem to cover particularly those in the public sector like social protection in the form of an elderly people’s

²⁰⁶ That the ‘social policy instrument’ is not always found becomes clear in the explanation of Gippini Fournier and Rodríguez Míguez. They explain thoroughly (with 47 pages) the so-called ‘golden shares’ judgments, thus also case C-463/00 *Commission v. Spain*, and confine their observation to one sentence (justified as such) of the rejection of Spain’s additional argument under Article 86(2) because Spain had not set out in detail the reasons for unacceptable economic conditions flowing from the elimination of the contested measures (golden shares). However, significantly, they qualify the public service task as being of general *economic* interest. See Eric Gippini Fournier and José-Antonio Rodríguez Míguez, *Actions spécifiques dans les sociétés privatisées: le beurre ou l’argent du beurre. A propos des arrêts de la Cour de justice des 4 juin 2002 et 13 mai 2003 sur les <<golden shares>>*. *Revue du Droit de l’Union Européenne* 1/2003 p. 72.

home à la *Sodemare*. It is natural to reason that those under the Employment and Social Policy Chapters of the Treaty would also qualify. A further question is whether this ‘policy instrument model’ could or should also be enlarged so as to cover in the Treaty *expressis verbis* other related areas, such as health services and medical care, education and culture. My submission is that it would be difficult to find a better instrument that would be both politically viable and linked to the existing case-law. Anyway, a likely path of development is that the Member States will not find the unanimity required to amend Article 86(2) which will simply underline the judicial-constitutional manner (in contrast to a politico-constitutional manner) of deciding these issues in the Community.

Since the Treaty of Nice, the ‘social policy instrument’ category under Article 86(2) EC is naturally to be interpreted also in the light of Article 137(4) EC, first indent, according to which EC Directives shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof. In the light of *Albany*, there is no contradiction. In fact, Article 137(4) enshrines the previous case-law as to the rights of the Member States.

However, the ‘particular social task of general interest’ and ‘social policy instrument’ today characterise Article 86(2) not only in social security matters but more broadly. That is not just a matter possibly of broadening the scope of Article 86(2) but also has an impact on its material interpretation, the proportionality assessment included. I discuss that interpretation below in the light of a concrete case, i.e. that of the Finnish Statutory Earnings-Related Pension Scheme (TEL). It suffices here to denote that in a material sense Article 86(2) does not mean any a priori precedence given either to competition or public service values. This is also the firm conclusion – after a thorough analysis – of Baquero Cruz.²⁰⁷ Interestingly as such, he takes the idea of the ‘priority problem’ from Rawls’ *A Theory of Justice*, namely from Rawls’ attempt to reduce the role of intuition in the theory of justice by introducing the idea of a ‘serial or lexical order’.²⁰⁸ The author, however, dares to suggest caution, especially in an

²⁰⁷ See footnote 127, *supra*, p. 211.

²⁰⁸ *Ibid.*, p. 174 where Baquero Cruz refers to Rawls, pp. 42-43. Thus, Rawls means ‘an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception’. This is what Baquero Cruz has also quoted. However, a few lines further Rawls himself gives as an example (‘as an important special case’) that the principle of ‘equal liberty’ is prior to the principle regulating ‘economic and social inequalities’. For Rawls, ‘[t]his means, in effect, that the basic structure of society is to arrange the equalities of wealth and authority in ways consistent with the equal liberties required by the preceding principle’. Well, Rawls discusses constitutional matters but has certainly not taken here any stand on norms like Article 86(2). We may still assume that regulating (or reducing) social inequalities by social policy measures (like by pension schemes – see sections 2.6 and 2.7, *infra*) under Article 86(2) may delimit the liberty of at least legal persons on the (internal) market and thereby that of some individuals which would *prima facie* seem to contradict Rawls’ serial or lexical order. ‘Salvation’ is in Rawls’ explanation on equal liberty and the concept of liberty where he, too, of course comes to a balancing between conflicting liberties and thereby restricting them; Rawls, p. 203. Next to harbouring finally into these liberty explanations, the margin of discretion, even elusive

EU context, in any direct analogical *application* of this kind of theoretical ideas (inspiration from them is another issue); the Treaty is predominantly a legal-political compromise and a quasi-constitution of a *sui generis* legal structure; the EU is neither a state, nor a mere international organisation. Besides, as the own text of Baquero Cruz sets forth, Fritz Scharpf has contended (in a very simplifying way) – echoing Rawls, as Baquero Cruz writes – that in the Community context there is a priority of economic over social policy.²⁰⁹ For the author, Scharpf's article above all does not discuss European law, especially not in its evolution, but is filled with reasoning mainly from the perspective of the political sciences. Accordingly, Baquero Cruz himself convincingly proves that Article 86(2) is finally a delicate balance where the market values and public service values are on an equal footing. In that sense his conclusion, which the author shares, is that the case-law of the Court has not undermined the public service values whereas the Community legislation on public services shows signs of a relative priority being given to competition.²¹⁰ However, as to *Albany*, he does not discuss the social policy instrument under Article 86(2) but bases his conclusion in brief on the Member States' margin of discretion in arranging their social security schemes. This is, of course, included in paragraph 122 of *Albany* but is far from all in that judgment.

A general question on Article 86(2) still remains. Thus, is Article 86(2) a justification or an exception or neither of these? I recall that in *Commission v. Netherlands* (case C-157/94) the Court qualified it as derogation from the rules of the Treaty. Accordingly, in *Albany* (paragraph 103) the Court called it a derogation from the 'general rules of the Treaty' (thus, not just from competition rules). The difference between these two judgments is that in the previous case-law the Court also declared how the interpretation of Article 86(2) must be kept strict (paragraph 37 of *Commission v. Netherlands*) while in *Albany* this qualification of the interpretation is not present. For clarity's sake the author – like Baquero Cruz – highlights that in *Commission v. Netherlands* the interpretation finally was not especially strict while the Court found that the exclusive rights to import electricity for public distribution were found to be compatible with the Treaty. In any case, it would have been rather exceptional in *Albany* for the Court to first declare the need for a strict interpretation of Article 86(2) and then as the next step to proceed with an interpretation that at least

balancing between economic and social factors, and the complexity of the (e.g.) social policy matters concerned, which are all inherent in the interpretation and application of Article 86(2) (well also found by Baquero Cruz), are reasons why it does not always follow Rawls' serial or lexical order. It is more fruitful to discuss Article 86(2) above all via concrete cases (this is what Baquero Cruz in fact also does) than via general theoretical structures. Besides, the serial order is in an EU context liable to misleading simplifications similar to that of Sharpf, below.

²⁰⁹ Ibid. As to Sharpf, see Fritz W. Sharpf, *The European Social Model: Coping with the Challenges of Diversity*, *Journal of Common Market Studies* 2002 Vol. 40, Number 4, p. 647 and 665. At a later point Sharpf summarizes and finds a fundamental asymmetry between policies promoting market efficiencies and those promoting social protection and equality. The author dares to disagree. Sharpf's simplifying contention is substantively the same as that presented from a legal-constitutional angle by Barry Fitzpatrick in his 'Theory of Converted Pyramids and the EU Social Constitution', in Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Hart Publishing 2000, pp. 303-324. For a criticism of such an alleged and general supremacy of economic policy over social policy, see Hellsten 2005, Chapter II, *passim*.

²¹⁰ Baquero Cruz, footnote 139, p. 211.

prima facie seems to exceed the wording of the Treaty. However, Baquero Cruz argues that Article 86(2) is neither a justification nor an exception but ‘rather a binary- or switch-rule that establishes the conditions for the application or non-application of the treaty with regard to situations involving undertakings entrusted with the operation of services of general economic interest.’²¹¹

The author’s view is - certainly after *Albany* while Baquero Cruz does not rely on *Albany* at this point – that Article 86(2), first, includes a justification pattern (that I explore below), and, second, is a derogation (however radically grown over time) from general Treaty rules. Its interpretation, however, is a *sui generis* issue.²¹² It cannot be described as strict in the sense that it has surmounted the wording of Article 86(2) so as to reflect a certain change in the status of public services, thus it is not limited only to the classical ‘general economic interest’. It is a potential shelter of public services in more general terms, covering especially different social policy instruments. As to social security instruments, their recognised status under Article 86(2) EC is naturally supported by Article 34(1) of the Charter of Fundamental Rights of the EU according to which ‘the Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as ...old age,...in accordance with the rules laid down by Community law and national laws and practices’. While the nature of this provision is disputed (a right or a principle in the sense of Article 51(1) of the Charter and Article II-112(5) of the Constitutional Treaty) a meaningful interpretation thereof in any case lends support to the independence and immunity of social security schemes in relation to competition rules instead of the opposite.²¹³ Article 16 EC supports the same outcome.

²¹¹ Ibid., p. 176.

²¹² Reference can be made to judgment in case 94/74 *IGAV v. ENCC* [1975] ECR 699, paragraph 34, where the Court described Article 86(2) as laying down ‘a particular system in favour of undertakings entrusted with the operation of services of general economic interest’. This reference owes to Baquero Cruz, footnote 139, *supra*, p. 176.

²¹³ For the Charter as a point of reference in EU law, see case *Parliament v Council* in footnote 107, *supra*. As to the nature of Article 34(1) of the Charter, e.g. Contiades, footnote 106, *supra*, p. 71, holds – unlike the author - that it would be only a principle (judicially cognisable according to Article II-112(5) only in the interpretation of the implementing acts and in ruling on their legality). Sandra Fredman clearly finds it a social right; see Sandra Fredman, *Transformation or Dilution: Fundamental Rights in the EU Social Space*, *European Law Journal*, Vol. 12, No. 1, January 2006, pp. 57-58. Antoine Lyon-Caen finds that it is firm in its formulation and merits the designation of a social right; see Antoine Lyon-Caen, *The legal efficacy and significance of fundamental social rights: lessons from the European experience*, in Hepple (ed.), *Social and Labour Rights in a Global Context*, Cambridge University Press 2002, p. 183. In case that the EU Charter becomes legally binding (either as a part of the Constitution or otherwise) it is for the Court to decide on the nature of the clauses of the Charter.

2.6 The Finnish Statutory Earnings-Related Pension Scheme (TEL) vis-à-vis EC Competition Rules

2.6.1 Background

Each EU Member State has a unique statutory earnings-related or other employment pension scheme(s).²¹⁴ A Finnish speciality is that seven private and authorized insurance companies (and to lesser extent numerous pension foundations and funds established by single employers) run the statutory Earnings-Related Pension Scheme ‘TEL’ (hereinafter also ‘TEL’,²¹⁵ ‘the TEL-scheme’ or ‘the scheme’; ‘TEL’ is also the abbreviation of the pension law concerned) applicable to workers and employees in the private sector. These companies represent roughly 80% of total pension responsibilities and the two largest of them some 65%. Nevertheless, as a statutory scheme it falls under the so-called first pillar in the EU’s social security jargon and is subject to Regulation 1408/71, this being replaced by Regulation 883/04 etc. In addition to its fundamental nature in the national social security system, TEL is also a challenging legal feature, both as touching, as to some of its components and features, even the border line of competition rules and collective labour law (see *Albany*, paragraphs 59 and 60),²¹⁶ and as a potential candidate for exemption from EC competition rules under Article 86(2) EC. Both aspects can be meaningfully discussed only after a sufficient presentation of the main features of the highly complex (in its details) pension scheme as such.

The TEL-scheme thus forms an elementary part of the law-based national social security system and doubtlessly falls under ‘social security systems’ referred to by Article 137(4) EC according to which Community provisions adopted pursuant to this article ‘shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof.’ This proviso clearly has an interpretative impact even outside the strict ambit of Article 137 EC. The purpose of the TEL-scheme is to guarantee every wage-earner (or his survivors) in the private sector a reasonable income level when retired.

The TEL-scheme is *grosso modo* based upon solidarity, even over generations, which requires its basis to be defined in law and a system equipped with comprehensive state control. Nearly a third (or, a quarter, depending on the details of assessment) of the financing of pensions is nowadays based upon funding and the non-funded rest is financed by contributions (the pay-as-you-go part, hereinafter also ‘PAYG’; *jakojärjestelmä*). The state does not finance it at all. Given that the pension benefits (i.e. the accrual rules etc.) are equal throughout the scheme this kind of financing (only a partial funding) requires fixing in law the calculation basis for contributions and pension liabilities, decision-making on the funding degree and limiting the profit rights of the owners of the TEL companies.²¹⁷ The Ministry of Social Affairs must

²¹⁴ See e.g. the Commission’s data bank MISSOC,

http://ec.europa.eu/employment_social/social_protection/missoc_en.htm.

²¹⁵ The abbreviation ‘TEL’ may also refer to the law concerned, the Employees’ Pensions Act.

²¹⁶ On the *Albany*-immunity in general, see section 1.3, *supra*.

²¹⁷ According to Sections 21 and 22 of the Act on Pension Insurance Companies the yield (profit) must be reasonable and correspond to the risk of losing the capital included in ownership. In practice the TIR (see section 2.6.3.2, *infra*) plus one percent has been regarded

have a particular reason if it approves differences in the calculation basis that would make the treatment of pension institutions' joint tasks more difficult (Section 3(a) TEL). The tiny possibility of differences (that cannot concern pension benefits) has remained residual, if it has any practical effect at all from a systemic point of view. While writing this, the Diet was dealing with a governmental bill that would also enshrine the compulsory co-operation of the pension insurers directly in law.²¹⁸

Seen from a systemic point of view, the activities are also subject to permanent state control for the part that implies discretionary powers for the TEL-companies and other institutions running the scheme. However, the system includes the possibility to refund contributions (*asiakashyvitys*) and is in this way subject to competition between the companies. A further sensitive or critical part is the inherent restriction of competition in fixing the minimum and maximum amount of refunds from the yearly contributions. Furthermore the *single* 'technical interest rate' (sometimes also called as interest assumption, *laskuperustekorko*, hereinafter also 'TIR'), applied throughout the scheme and defining the funded part of the benefits, can be seen as a restriction of competition. The refunds indirectly have – by lowering the total contribution – the effect of also lowering the workers' contributions. I discuss these refunds briefly below, in section 2.6.3.1 Contributions.

When Finland joined the EU the debate about the TEL-scheme resulted in a proviso that the First Life Insurance Directive 79/267/EEC (codified by Directive 2002/83/EC) does not concern pension insurance companies running the TEL scheme.²¹⁹ The main condition in this set of provisions is that these companies, while they must be established in Finland and can belong to bigger insurance groups as subsidiaries, must completely differentiate these activities from any other activities and de facto run them in a separate legal entity. In practice the companies concerned are mutual with two exceptions. However, in the context of EU law it is obvious that the authorized insurance companies (as well as the company foundations and funds) running the statutory scheme are undertakings in the sense of competition rules, especially because there are certain competition elements in their activities. Furthermore, from the point of view of a worker, the pension rights and duties are directly statutory with the exception of fixing the yearly amount of contributions where the social partners intervene.²²⁰

In sum, the restrictions of competition inherent in agreeing upon the single TIR and the contributions, as well as in confirming them by a decision of the Ministry of Social Affairs may become subject to a legal assessment in the light of the EC Treaty,

as reasonable, see Ilari Kallio, *Vakuutuksenottajan oikeudet työeläkevakuutusyhtiön varallisuuteen*, Suomen Vakuutusalan Kustannus ja Koulutus OY, Helsinki 2005, p. 33.

²¹⁸ Governmental Bill (HE) 45/2005, Sections 167, 172 and 212.

²¹⁹ See the Accession Act of Austria, Finland and Sweden, Documents, Article 29, Annex I, Paragraph XI(B)(II) Insurance; OJ C241, 29 August 1994. Article 3(8) of Directive 02/83/EC now incorporates the same provisions.

²²⁰ The worker may nowadays, however, decide on his or her retirement age between 63 and 68 years. In describing and assessing the Finnish Earnings-Related Pension Scheme TEL I also use the notion 'worker' to cover any employees. In the language usage of the scheme, an 'employee' covers both blue and white collar workers.

notably in relation to its competition rules.²²¹ The non-application of the First Insurance Directive does not *de jure* exclude such an assessment in relation to and on the basis of the Treaty's competition rules, notably under Article 81 EC, that according to settled case-law also has the horizontal direct effect, thus it can also be invoked between private parties.²²² Article 81 EC first of all prohibits and declares void any price agreements between the competing undertakings.

Notable is also the equally settled case-law that Article 81 EC, read in conjunction with Article 10 EC requires the state '[n]ot to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings. Such is the case, according to the same case-law, where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [81] of the Treaty or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.'²²³

A further discussion point is which elements and to what extent the TEL scheme can be exempted from EU competition rules under Article 86(2) EC. However, a preliminary discussion is whether the agreements on contributions, the minimum and maximum refunds included, and the TIR include relevant features of collective labour agreements (hereinafter 'collective agreements') and may thus arguably fall even under the basic Albany-immunity of collective agreements, i.e. under that established in paragraphs 59 and 60 of *Albany*. A more conventional question is whether these features may weigh as arguments in an assessment of the scheme under Article 86(2) EC. This would be based on the agreements concluded by the central social partners on these issues. A brief recap of history is first necessary.

2.6.2 Major Agreements of Social Partners

The central social partners, nowadays the Confederation of Finnish Industries EK (employer organisations' national confederation), Central Organisation of Finnish Trade Unions SAK (blue collars' confederation), Finnish Confederation of Salaried Employees STTK and Confederation of Unions for Academic Professionals AKAVA,

²²¹ I take it for granted that the restrictions of competition in the TEL scheme embody the 'trade effect', i.e. may effect the trade between Member States which is the prerequisite for the applicability of Article 81 EC because the restrictions cover the TEL activities throughout the country; see e.g. case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 33. There is also, of course, the theoretical possibility that foreign pension operators would challenge the TEL scheme by virtue of rules for of free provision of services. Such an action would, however, reflect general reliability (image) problems in the eyes of the general public, employers included, which renders such an action unlikely to the extent that I set aside any reasoning thereon. For foreign operators the establishment of a subsidiary company in Finland for TEL purposes is not excessively difficult or costly.

²²² See case 127/73 *SABAM (BRT-I)* [1973] ECR 51, paragraph 16.

²²³ See *Albany*, paragraph 65 and the case-law referred to there. There is no space for any in depth reasoning on this 'state act prohibition'. However, the prohibition first means that a state act (or omission etc.) is not any comprehensive escape *per se* from Article 81 EC. Second, and more importantly, in the context of TEL it is elementary to see that the scheme exceptionally, while being law-based social security, includes certain competition elements.

have de facto negotiated and agreed orally on many parts in the TEL scheme since its beginning in 1963. This is what one would expect because there is no financing by the state in the scheme.

In the autumn of 1991 when an economic recession was already hitting Finland, the central social partners agreed as a part of the central income policy agreement (tupo)²²⁴ for the years 1992 and 1993 upon principles to be followed in a long-term balancing of the scheme. A central measure was the introduction of the employee's contribution from 1993 onwards; see my explanation under section 3.6.3.1, *infra*.

In 1995 the central social partners concluded as a part of the national recovery policy – still as a follow-up to the deep economic recession of the early 1990s – an agreement on balancing the financing and certain calculation elements with a long term perspective, i.e. as far into the future as 2030. The agreement was implemented by the state by relevant amendments in the TEL. In a broader framework agreement in 2001 they agreed upon a flexible retirement age system (63-68 years) and further comprehensive balancing measures to keep the short and long-term contribution pressure under control. This was realised by amendments of TEL that came into force in 2005. At the same time, they agreed upon amending the TIR so that it ‘supports the long-term financial balance of the TEL-scheme and is suitable for every pension institution.’²²⁵ The revised TIR has been used since 2003.

Since 2001 the central income agreements (tupo) include a sentence on pension matters under the heading of Continuous Negotiation Procedure (jatkuva neuvottelumenettely). The present central tupo-agreement for 2005 to (30.9.) 2007 laconically states that

‘The continuous negotiation procedure may also include issues requiring tripartite²²⁶ treatment like pension policy...’.

Even without this kind of entry in the income policy agreement the central social partners have concluded oral agreements, as mentioned, on pension contributions and the TIR at least since 1992/1993 when the workers' contributions were also introduced in the TEL scheme.

2.6.3 Agreements on Contributions and TEL Technical Interest Rate ‘TIR’

2.6.3.1 Contributions

For three decades, i.e. until 1993, the financing of TEL was based solely on contributions paid by the employer. Nowadays the contributions vary, depending on the age of the worker and the size of the employer's workforce (less or more than 50 workers), so that in 2006 the average total contribution is 21.2% out of wages paid.

²²⁴ For central tupo-agreements see the explanation at footnote 243, *infra*.

²²⁵ See paragraph 9(2) of the framework agreement of the central social partners of 12.11.2001.

²²⁶ Tripartite negotiations on working life issues have their roots in the ILO, of course.

However, the procedure is deeply rooted in the Finnish practice, historically stemming even from the national experience during and immediately after the WWII.

The workers' contributions thereof are 4.3% until the age of 52 and 5.4% for older people. The age factor is a consequence of the new policy to support a prolonged working of aged employees, up to the age of 68 years. The basis also for the workers' contribution is – naturally, in this kind of social security system - fixed directly in law (Sections 1 and 12(b) TEL).

When the workers commenced to pay contributions in 1993 the central social partners also agreed upon the employers' and workers' shares changing in future in relation to the amendments of the total contribution, unless agreed otherwise. If the total contribution increases, the increase is divided into two. Similarly, any reduction of the total contribution is divided into two.²²⁷ Since 2001 the oral agreements on contributions have been in a formal sense concluded within the Continuous Negotiations Procedure. Nevertheless, the contribution components are determined on the basis of actuarial principles established by law.

The refunds of contributions are also based on the law²²⁸ that requires – in order to guarantee all the time a solid financial status of the whole system – collecting contributions slightly in excess of the expected final real requirements. Based on the solvency ratio the TEL companies are then entitled to grant to the policy holders as refunds a percentage (confirmed by the Ministry) of the investment yield (investment capital) that exceeds a minimum ratio.

2.6.3.2 Technical Interest Rate TIR

The TIR defines the growth of the funded part of the benefits. It should be noted that TIR has no effect on benefits themselves, which are stated in the legislation. However, the TIR determines how much of the benefits are financed from the funds held by the TEL institutions and how much from the PAYG part collected jointly in TEL contributions.²²⁹ It has its basis in law²³⁰ that prescribes that a single TIR is applied throughout the scheme and pension institutions. A motive for this is that, if the TIR varied between institutions, then the institutions having lower TIR's would be subsidized via the PAYG part by institutions having higher TIR. In practical terms it

²²⁷ See the central income policy agreement (tupo) of 29 November 1991, Annex 1, p. 1. The same was repeated by the central agreement of 30 November 1992, Annex I, p. 6.

²²⁸ See Section 12(a)(2) TEL. Furthermore, Chapters 7 and 8 in Act on Pension Insurance Companies (354/1997) stipulate that a reasonable share of surplus shall be reimbursed to policy holders but only to the extent that it is not already 'consumed' in reinforcing solvency and the yield for share or guarantee capital. In practice the minimum and maximum refunds are confirmed by the Ministry on a yearly basis.

²²⁹ The TIR varied during 1980s and early 1990s between 8 and 10%. A structural change took place in 1993 in the context of targeting to a long term sustainability of the whole scheme; introducing the workers' contributions in 1993 was a similar move. The TIR was lowered from 9% in 1993 (first half) to 6.5% in 1994. A further 'structural' decrease from 6.5% to 5.5% took place in 1997 in order to give more space for investments by the insurance companies. Since 1999 the lowest TIR has been 4.00%. For the second half of 2006 it is 6.5%.

²³⁰ Section 12(a)(5) TEL.

shows the amount of the investment return that has to be added to the pension capital funds. The first three percentages form a general discount rate. The part of the TIR which exceeds the discount rate is used to maintain and accrue the real value of the old-age pension liabilities, and the part of the yield which exceeds the TIR is used to strengthen the solvency margin of the insurance companies and reduce the policyholders' and insured persons' contributions.²³¹ While writing this, the Diet was dealing with a bill that would stipulate that in fixing the amount of a 'supplement factor' (täydennyskerroin, replacing the present TIR) account shall be taken of 'the requirements in guaranteeing the pensions and solvency of the pension institutions'.²³² Substantively there would be no change in relation to the present TIR. The central social partners have further agreed on 30 January 2006 upon proposing amendments to the calculation of the TIR/supplement factor so as to reflect a targeted future increase of the share of equity type assets in the investment portfolios. The weight of equity return would be 10% of the TIR/supplement factor gradually after five years from its entry into force.²³³

The amount of the TIR is subject to a natural tension whereof only a simplified description is possible here: a high TIR means more money transferred to pension capital funds and in this way it lowers cost pressures on a time span of decades, in fact even over generations. A relatively lower TIR leaves more money for 'working capital' (toimintapääoma) of the pension companies, i.e. more room for high risk investments which on the other hand also have higher expected return and so would lead to lower future contributions. However, the maximum limit for refunds of contributions increases when the working capital increases. So, lower TIR may also mean higher refunds. In general terms the trade union side drives for a relatively high TIR so as to avoid disruptive total contribution increases in future which could also lead to a reduction of the pension rights and benefits. This is a question of solidarity towards the diminishing active work force in future which has to bear the bulk of total pension costs because the system is based only on a partial funding. The employer side has a tendency to advocate a more PAYG system oriented solution, and, accordingly, towards a relatively lower TIR while it also gives more space for refunds of contributions. Practice shows that the TIR represents a compromise between these two main lines.²³⁴ It is based on a formula, agreed between the parties under the same negotiation procedure, according to which the TIR is higher if the average free investment capital of the TEL companies and other TEL actors is increased. A permanent agreement is that the TIR cannot be raised more than half a percent per six months.

²³¹ Christina Lindell, Financing Pensions, in Marjukka Hietaniemi and Mika Vidlund (eds.), *The Finnish Pension System*, The Finnish Centre for Pensions 2003, p. 79.

²³² See the governmental Bill 45/2005, section 171 (my translation).

²³³ See the 'Investment Report on the Statutory Earnings Related Pension System' (Työeläkejärjestelmän sijoitustoimintaa koskeva selvitys) by the negotiation group of the central social partners of 30 January 2006. In this report the social partners also call it an agreement, the implementation of which requires amendments in legislation and decrees of the Ministry, p. 14.

²³⁴ In the Report mentioned in the previous footnote the social partners agree that an always maximally high TIR may also turn against its original purpose, depending on the fluctuation of the investment yield, p. 3.

It is obvious that in this kind of multi-actor system which also operates on the financial market there are single actors (perhaps amongst the company pension foundations and funds) that might see an advantage in having a TIR fixed per pension institution. Furthermore, the participation of the social partners in fixing the TIR makes it a *prima facie* attractive target for a competition-law-minded or ‘anti-corporatist’ legal criticism or even attack.

2.6.4 Procedure Regarding Contributions and TIR

An essential joint feature of contributions and TIR is that their levels are also subject to a central agreement²³⁵ within the Continuous Negotiation Procedure between the central social partners: EK, SAK, STTK and AKAVA. A further joint feature is that the Ministry of Social Affairs and Health confirms with its decision the amounts, normally for a six months’ period regarding the TIR and for the calendar year regarding the contributions. In formal terms the decision is adopted on the basis of an application of the different TEL-companies that mandate their joint national umbrella association, the Finnish Pension Alliance TELA, to present the application to the Ministry.²³⁶ It is also subject to an opinion of the Finnish Centre for Pensions that is the law-based and tripartite cooperation body of the pension institutions. In practice its contents normally come from actuarial expertise (nowadays prepared by the Finnish Centre for Pensions) but are nevertheless subject to a negotiation and agreement of the social partners under the Continuous Negotiation Procedure whereby the representatives of the big TEL-companies are also present as experts.²³⁷

2.6.5 Elaborating Remarks on TEL in a European Context

There are still essential differences in the formal basis of the national employment or earnings-related pension schemes. As seen above, in the Dutch case subject to judgment *Albany*, the scheme as such was once established by a collective agreement under private law. The state intervention was realised essentially in rendering the membership in a sectoral scheme compulsory and bringing the decision-making of the fund under certain administrative and judicial control. In the unofficial EU classification of pension schemes the Dutch scheme(s) mainly fell under the second pillar. The non-profit-making scheme includes several essential elements of solidarity²³⁸ but was nevertheless deemed by the European Court of Justice, due to the funds

²³⁵ A Working Group of the Ministry (so-called ‘competition working group for the evaluation of the statutory employment pension system’; Memorandum of the Ministry of Social Affairs and Health 2001:35, p. 62-63) stated in its memorandum that the social partners agree upon the level of the TIR which is then subject to the confirmation by the Ministry.

²³⁶ For the company foundations and funds the ministerial decree confirms the same amounts.

²³⁷ This way the procedure is also described by the Report in footnote 233, *supra*, section 1.5, pp. 13-14.

²³⁸ See paragraph 75 of *Albany*, describing the submissions of the pension fund concerned: ‘Such solidarity is reflected by the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from contributions in the event of incapacity for work, the discharge by the fund of arrears of contributions due from an employer in the event of the latter’s insolvency and by the indexing of the amount of

determining themselves the amount of contributions and benefits²³⁹ and operating on the principle of funding, to be an undertaking in the sense of Article 81 EC. As a whole, the sectoral schemes form an important part of the national pension system in the Netherlands (*Albany*, paragraph 105).

In comparison to the Dutch scheme, the Finnish TEL as a statutory one also forms in the pecuniary sense the core of the national first pillar. This part of the total pension of a person is normally 60 to 90%, the rest comprising typically the National Old-Age Pension provided by the State. Unlike the Dutch scheme the TEL scheme was established in 1962 as a directly – and regarding pension rights a fully - statutory scheme, based on an ordinary law enacted by the Diet. In that system any employer is obliged to cover the pension insurance either by choosing a TEL-company or by making his own arrangements in the form of a company pension foundation (*eläkesäätiö*) or fund (*eläkekassa*). Some sectoral funds also exist. It is not permitted to meet the TEL-obligations by book reserves. The employer may freely change the company which inserts one element of competition in the scheme. The scheme is based on a partial funding so that a quarter of the contributions paid must be transferred to pension capital funds so as to secure for its part the payment of future pensions. Regarding the economic responsibility, a solidarity element in TEL is that in case of bankruptcy the other TEL-companies are responsible for the pensions concerned. This has been tested in the case of the pension insurance company *Eläke-Kansa* with a *grosso modo* unproblematic result. However, a much more important feature is that for the non-funded part of pensions (being of the PAYG-system) the TEL companies bear a joint responsibility.

2.6.6 Justification of TEL in EC Law

2.6.6.1 General Remarks

After the introductory explanation above I recall my proper question: do the contribution and TIR agreements fall under the *Albany*-immunity of collective agreements or do they remain subject only to the application of Article 86(2) EC? The difference between the two options is not negligible. Under the *Albany*-immunity the Commission has no independent role, unless by testing its limits in an infringement procedure while it has an independent role under Article 86(2) EC, even by issuing directives and decisions. Next to this, under the *Albany*-immunity a usual proportionality assessment does not take place (but that under the nature and purpose of an agreement) while the proportionality assessment is debatable under Article 86(2)

the pensions in order to maintain their value. The principle of solidarity is also apparent from the absence of any equivalence, for individuals, between the contribution paid, which is an average contribution not linked to risks, and pension rights, which are determined by reference to an average salary. Such solidarity makes compulsory affiliation to the supplementary pension scheme essential. Otherwise, if 'good' risks left the scheme, the ensuing downward spiral would jeopardise its financial equilibrium.'

²³⁹ Additionally, the level of benefits depended on the results of investments made by the fund.

EC.²⁴⁰ Under the Albany-immunity (only) the purpose and nature of the agreements determine the outcome.

In considering whether the ‘TEL-agreements’ of the central social partners on contributions and TIR may fall under the Albany-immunity one has to emphasize at the outset that the position of the TEL scheme is in the national debate (as connected to the exemption clause in the application of the First Life Insurance Directive) often presented in a misleading way. It means highlighting how there is an exemption from competition in running the TEL scheme. In reality the situation is – also in a European context – the other way round; i.e. that the TEL scheme is one of the rare schemes in the first pillar that on the whole includes some competition. Accordingly, from a systemic point of view, the only clear alternative for the TEL scheme would be a state monopoly running it.

Concerning the fixing of the contributions, the maximum and minimum refunds included, and the joint TIR/supplement factor one may well refer to the fact that the TEL creates for the pension providers a legal framework which itself widely eliminates the possibility of competitive activity. In such a situation there is no autonomous conduct of the undertakings and Article 81 EC does not apply.²⁴¹ If this submission is not accepted, then it is also the case that the contributions and the TIR/supplement factor remain subject to an assessment under Article 86 EC.

2.6.6.2 TEL Scheme and Albany-Immunity

As background one has to recall the structure of the Albany-immunity: collective labour agreements are by their nature and purpose exempted from competition rules. Furthermore, the essential passage in this case is in paragraph 62 of Albany:

First, like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings

²⁴⁰ I deal with the proportionality assessment under Article 86(2) in section 2.7.1, *infra*.

²⁴¹ See case C-359/95 *Ladbroke Racing Ltd.* [1997] ECR I-6265, paragraph 33. However, Article 81 EC may apply if it appears that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (paragraph 34 and the case-law referred to there). On the other hand, although Articles 81 EC and 82 EC are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10 EC, which lays down a requirement to cooperate, none the less require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (see i.a. case C-198/01 *Fiammiferi* [2003] ECR I-8055, paragraph 45). Articles 10 EC and 81 EC are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects (*Fiammiferi*, paragraph 46). In the light of *Fiammiferi* (and the settled case-law referred to therein), it seems indispensable, indeed, to continue the reasoning on TEL under Article 86(2).

was concluded in the *form* of a collective agreement *and* is the outcome of collective negotiations between organisations representing employers and workers.(emphasis added)

I would remind the reader that ‘organisations representing’ should be read ‘representative organisations’.²⁴² However, that condition is simple in a Finnish TEL context: the national social partners are representative while the union density is some 80 percent and the representativeness is high on the employer side, too. But that is far from all in considering the scope of the Albany-immunity *ratione personae* in this case. A preliminary issue is the fact that in formal terms the central income agreements (tupo) are not collective agreements in the strict legal sense,²⁴³ thus they do not create *ipso jure* obligations and rights between individual employers and workers. In this case, however, the agreement concerned is not the only descriptive clause on the Continuous Negotiation Procedure in the central agreement (tupo) itself but the ‘material’ agreements, thus concerning the precise yearly and six months’ agreements on the proposals for the Ministry of Social Affairs and Health concerning the contributions and the TIR. These agreements are clearly meant to have practical consequences even on the level of single contracts of employment, although via a ministerial decision; the Ministry confirms the employee’s contributions by a decree. Hence, the agreements concerned are meant to be binding.

Traditionally in the Finnish labour law doctrine the collective agreements may include, in addition to *normative clauses* (normimääräys) binding *de jure* between single employer (who is a member of the employer organization concluding the agreement) and his individual workers, also so-called *obligatory clauses* (velvoitemääräys) that are legally binding between the contracting parties.²⁴⁴ In this case the parties are the central social partners. The obligatory clauses derive their binding effect directly from the collective agreement itself, ‘without needing another contractual relationship as their substratum.’²⁴⁵ Thus, there would be an obvious temptation to explain the agreements of the central social partners to be obligatory clauses in an agreement under the Collective Agreements Act.

The temptation above still clashes against two insurmountable obstacles. *First*, the yearly and half-year agreements on the contributions and TIR are not made in the form of a written agreement but are concluded by expressing consensus on a memorandum prepared by the Finnish Centre for Pensions. Only the framework

²⁴² See the explanation in section 1.3.2, in fine, *supra*.

²⁴³ The reason is that according to their statutes the confederations do not have any general power to make agreements binding the member federations and their members; see e.g. Antti Suviranta, *Labour Law in Finland*, Kluwer Law International 2000, p. 184. Bruun has characterized these ‘tupo-agreements’ as informal agreements. They form a framework or guidelines in making binding collective agreements between employers’ and workers’ national (sectoral) federations; see Niklas Bruun, *Labour Law and Non-Discrimination Law*, in Pöyhönen (ed.), *An Introduction to Finnish Law*, p. 194. The effect of the central (tupo-)agreements is based on the overall strength of the central social partners in the society, as augmented by their capacity to make sustainable deals, as to relevant state measures, with almost any government.

²⁴⁴ As to obligatory clauses, see the nutshell explanation of Suviranta, footnote 243 *supra*, pp. 183-184.

²⁴⁵ *Ibid.*, p. 181

agreements on amendments in the TEL scheme of 1992/3, 1995 and 2001/2 are in the form of a written agreement between the central social partners. This means that the contribution and TIR agreements do not qualify in the sense of paragraph 62 of *Albany*. *Second*, the purpose of the central social partners has not been to conclude even the above-mentioned 1992/3, 1995 and 2001/2 agreements as collective agreements under the Collective Agreements Act, let alone the yearly agreements on contributions and TIR.²⁴⁶ I therefore conventionally call the latter ‘TEL agreements’.

The contents of the TEL agreements in any case mean a mutual commitment of the contracting parties, i.e. the confederations EK, SAK, STTK and AKAVA in the procedure of fixing the yearly pension contributions and the TIR.²⁴⁷ In more precise terms it also means continuing the 1992/3 agreement concerning the division of an increase or reduction of the total contribution and fixing the TIR within the calculation formula concerned. In the national practice they are, however, *prima facie* (while not *de jure*) comparable to separate central General Agreements (like that between the SAK and STK, nowadays EK, of 1997) or the SAK-EK agreements on paid annual holidays or dismissal grounds that are collective agreements in the legal sense of the term although not in the daily language of the social partners.²⁴⁸ Furthermore, given the multi-sectoral nature and effect of the TEL-agreements throughout a national social security scheme, it is important to see that the only meaningful negotiation procedure – for both management and labour - thereon must be fully concentrated on the central level. Therefore, the practical effect of the TEL-agreements is, as to their strength, clearly comparable even to that of classical normative clauses on remuneration in collective agreements.

My conclusion that the present TEL-agreements do not fall even as obligatory clauses within the Albany-immunity does not exclude such possible agreements in future – so as to overcome any competition law criticism against the TEL agreements and a single TIR. It has to be underlined that nowhere in *Albany* is it said or even hinted that only the normative clauses in a collective agreement may enjoy the Albany-immunity.

I still see a likely counterargument relating to the nature of the agreements concerned. It is that the Albany-immunity is an exception from competition rules and should therefore be construed narrowly even *ratione personae*, thus covering just sectoral agreements in the (hypothetic) Finnish case.²⁴⁹ My counterargument is that the TEL-agreements could be concluded by representative central social partners acting in their role as labour market organizations; furthermore, they could be concluded in the written form required by the national Collective Agreements Act; they would include

²⁴⁶ In the history there seems to be an ‘Agreement by the Confederations on Certain Working Life Measures’ of 24 May 1993 by which the social partners have i.a. agreed upon ‘keeping the total contribution in 1994 on the level of this year’; see the said Agreement, Annex 2.

²⁴⁷ See that a relevant institutional ‘labour market’ feature in the TEL scheme is that the social partners have their representatives on the boards of the pension companies, with the possibility of influencing all the decisions. Accordingly, the social partners are represented on the board of the compulsory cooperation body of the TEL institutions, the Finnish Centre for Pensions.

²⁴⁸ *Ibid.*, p. 170. See that there is a compulsory and sanctioned peace clause in law applicable to collective agreements under the Collective Agreements Act.

²⁴⁹ I recall how in *Albany* the ECJ resorted even to European social dialogue as an argument; see paragraph 58.

(obligatory) clauses on pension rights and duties as a part of the remuneration; finally, according to the traditionally predominating interpretation rule based on the parties' purpose one has to note that the agreements could fairly be meant to be binding *inter partes*. The formal difference in relation to *Albany* is that the TEL-scheme is *ipso jure* a multi-sectoral one whereas in joint cases (sic!) *Albany*, *Brentjens* and *Drijvende Bokken* the agreements concerned were sectoral. I maintain that in this particular TEL context the difference between sectoral and multi-sectoral agreements is of procedural importance, only. It does not have *per se* any competition-reducing nature. Besides, I recall, it is useless even to imagine that a decentralized negotiation procedure (separate TEL-agreements with corresponding acts of the authorities on a sectoral basis) could maintain the coherence and solidarity necessary in a national social security scheme. Finally, equal benefits throughout industries promote cross-sectoral professional mobility.

As to the application of the *Albany*-immunity *ratione materiae* also in the TEL-scheme, the contents of the contribution and TIR agreements are intended, as in *Albany*, to improve or preserve one of the working conditions, i.e. pension benefits as a part of the total remuneration. In other words, the *purpose* of the TEL-agreements concerned fully corresponds to that in *Albany*, paragraph 63. Seen from a procedural point of view, the confirmation of the contributions and the TIR by a ministerial decision clearly corresponds to the *erga omnes* declaration by a state organ (ministry) in *Albany* (paragraphs 66 to 70). It was declared as justified in *Albany*.

There remains the question what would happen *if* the social partners were to conclude their TEL agreements as collective agreements in the sense of the Collective Agreements Act. Self-evidently, it would not change the procedure fixed in law as to confirming the contributions and the single TIR by the Ministry. However, it would further strengthen the argumentation in favour of releasing them as well as the contributions and the single TIR from the scope of EC competition rules under Article 86(2) EC.

2.7 Justification of TEL under Article 86(2) EC

A general remark is that there would be solid reasons for maintaining that fixing the contributions (maximum and minimum refunds included) by a ministerial decree and confirming the single TIR by the Ministry would fall under the state defence as in case *Ladbroke*.²⁵⁰ Thereby Article 81 EC would not apply and the reasoning under Article 86(2) EC would become superfluous. Given that there is no guarantee – while the state measures anyway restrict the behaviour of private law companies which compete, too - of the breakthrough of the state defence and thus against a finding that the TEL agreements anyway represent autonomous conduct restricting competition, I see it as appropriate to continue the reasoning under Article 86(2).

²⁵⁰ See footnote 241, *supra*.

2.7.1 General Conditions under Article 86(2) EC

In case *Wouters* Advocate General Léger distinguished six conditions for the application of Article 86(2), as follows:

Article [86(2)] of the Treaty lays down six conditions for its application. It provides that: *undertakings* (first condition) *entrusted* (second condition) with the operation of a *service of general economic interest* (third condition) are to be subject to the rules contained in the Treaty *in so far* (fifth condition) as the application of those rules does not *obstruct* (fourth condition) the performance of the particular tasks assigned to them, subject to the reservation that the *development of trade* (sixth condition) must not be affected to such an extent as would be contrary to the interests of the Community.²⁵¹

Applying this break-down of conditions is here not problematic at all regarding the first three ones. Namely, the TEL companies, first, undoubtedly are, due to their partial competition and the possibility of regulated profits, undertakings in the sense of EC competition rules. Second, having obtained the licence from the government to run a TEL-insurance company, they are appropriately entrusted in the sense of Article 86(2).²⁵² Third, it is self-evident – in particular after judgments *Poucet and Pistre* and *Albany* – that the TEL companies run a service of general economic interest, even though after *Albany* it is more appropriate to call it a particular social task of general interest under Article 86(2).

The fourth, fifth and sixth conditions in the break-down of AG Léger are worth special attention. I provisionally follow the reasoning of AG Léger in the sense of distinguishing between the obstruction and proportionality issues, i.e. between the fourth and fifth conditions.

Developments in case-law show clearly a relative mitigation of the fourth condition concerned (obstruction). The Court had originally required proof that the application of the competition rules was *incompatible* with the performance of the undertaking's particular public service tasks.²⁵³ In *Albany* (paragraph 107) the Court, clearly inclining towards more lenient conditions, concluded that

²⁵¹ Opinion in case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 157.

²⁵² In terms of AG Léger the Court '[i]n *Albany*...by implication held that the mere fact, for employers and workers, of creating a sectoral pension fund and of requesting the public authorities to make affiliation to that fund compulsory was enough to support the conclusion that the fund constituted an undertaking *entrusted* with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty'; paragraph 160 of the Opinion, original italics. To be precise, in paragraph 90 of *Albany* the Court found that the state act (*erga omnes* declaration) to make the affiliation to the sectoral pension fund compulsory implied exclusive rights granted which then led to consider their justification under Article 86(2); paragraphs 98 to 111 of *Albany*.

²⁵³ See case 155/73 *Sacchi* [1974] ECR 409, paragraph 15; case 311/84 *CBEM* [1985] ECR 3261, paragraph 17; *Höfner and Elser*, paragraph 24; and case C-260/89 *ERT* [1991] ECR I-2925, paragraph 33.

[It] is not necessary, in order for the conditions for the application of Article 90(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject (*Commission v Netherlands*,... paragraph 52) or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14 to 16, and *Commission v Netherlands*,... paragraph 53).²⁵⁴

A few remarks suffice here. The mitigation of the obstruction condition thus means that the public service is of independent meaning ('...to perform the particular tasks entrusted to it ...') which besides must be read from the viewpoint that the Member States are entitled to first define their public service tasks. In addition, next to the practical obstacle to the service concerned, economically acceptable conditions suffice to justify the exclusive rights concerned. Judgment *Corbeau* is of special importance in this context. I recall that the case concerned an attempt to 'skim cream' within the national postal services. Preventing this was regarded as justified while the national monopoly had the right to operate under economically acceptable conditions.

The question about a proportionality test as a condition for justification under Article 86(2) is controversial. AG Léger maintained that it is applicable and founded his position on *Corbeau* (paragraph 14) and *Almelo*.²⁵⁵ In both of them the Court, however, accepted restrictions of competition in so far as the restriction of competition which it brings about is necessary in order to enable the undertaking to perform its task of general interest. However, this is not a real proportionality test²⁵⁶ which would entail reasoning at least on 1. whether the public service measures are appropriate for securing the attainment of the objective which they pursue and 2. whether they go beyond what is necessary in order to attain it. The last element would be the proportionality test in its less stringent form. A stricter solution would mean

²⁵⁴ Judgment *Commission v. Netherlands* concerned exclusive rights in the import and distribution of electricity, finally in a socially responsible manner as the national law required (i.a. paragraph 55).

²⁵⁵ Case C-393/92 *Almelo* [1994] I-1477, paragraph 49

²⁵⁶ This is also the firm position of Baquero Cruz, footnote 139, *supra*, pp. 185-198; at p. 191 he denotes that proportionality is not mentioned in *Corbeau*. He also highlights how cases *Commission v. Netherlands* C-157/94 and *Albany* do not include a real proportionality test (I fully agree), *ibid.*, pp. 193-4. Baquero Cruz also connects (p. 186) the proportionality issue to a competition approach by referring as an example to the presentation of Buendía Sierra regarding the compulsory assessment of the (hypothetical) less restrictive measures. He has argued in favour of this strictest form of proportionality applied under Article 86(2). Worth mentioning is also that Judge Lenaerts has denoted (footnote 197, *supra*, p. 427) how the proportionality test applies under Article 86(2), however referring to paragraph 14 of *Corbeau* only, and, regarding the least restrictive measure test, to the opinion of AG Léger in *Wouters*, paragraph 165. Indeed, there is no relevant judgment including this *least restrictive measure test*; especially, see the next footnote, as to case *Commission v. Netherlands*.

replacing the second element with considering whether the public service objective could be achieved by less restrictive means. It is clear that the proportionality issue is of importance regarding any public service subject to scrutiny under EC competition rules. In this sense it is also important that the Court in *Albany* – while it referred to *Corbeau* and *Commission v. Netherlands*²⁵⁷ - did not write out any proportionality test as we can see in the quoted paragraph 107 of *Albany*.

Thus, adhering to the position of Baquero Cruz I conclude, by virtue of judgments *Corbeau*, *Commission v. Netherlands* and *Albany*, that it is a necessity-test (whether the public service rights concerned are necessary for fulfilling the public service task) which is applicable under Article 86(2). It means the requirement of a legitimate public service objective and necessary measures or rights tailored in order to achieve that objective. It accordingly and clearly means that the Court does not require the national legislator to choose the option that is least restrictive for competition. In this way the Court has avoided giving priority to competition over services of general interest.

Before continuing the reasoning on the necessity-test regarding the Finnish TEL scheme it is appropriate to denote that regarding the sixth condition of AG Léger, the effect on intra-Community trade, the Court has not yet given its verdict. It looks, as Judge Lenaerts (referring to AG Léger in *Wouters*) has put it,²⁵⁸ that it is fulfilled when the other conditions for the exception under Article 86(2) are fulfilled. To prove the opposite would require a demonstration that the contested national measure has really had a substantive effect on intra-community trade.

Finally, in considering the status of the TEL agreements on contributions and TIR under the fourth and fifth condition of Article 86(2) (by AG Léger) it is to be highlighted that these agreements are parts of a system (regime) which is subject to complex socio-political considerations, even to a certain balance between capital²⁵⁹ and labour, not the least because it is financed by the contributions based upon work done (and to a lesser extent by the investment return of the TEL-companies). That balance has now been developed over some 45 years. The threshold for upsetting it by the intrusion of EC competition rules must a priori be high. Furthermore, while especially judgments *Poucet and Pistre*, *Albany* (see i.a. paragraphs 105 and 122) and *Cisal* (paragraph 45) all refer to the respective schemes' position as parts of a national social security system, one still has to underline this *systemic* starting point by referring to its so far most illustrative example in the European case-law, namely judgment *AOK Bundesverband*. Its interpretative value is by no means compromised by the fact that the judgment did not need to come under Article 86(2) because the associations of the health care funds were deemed to fulfil an exclusively social function and were therefore not deemed to constitute undertakings or associations of undertakings.

²⁵⁷ On this judgment Baquero Cruz has pointed out (footnote 139, *supra*, p. 193) – by solid reasons – how the Commission proposed the *less restrictive measures* test (paragraph 35) but the Court clearly ruled it out when considering the burden of proof (paragraph 58).

²⁵⁸ Lenaerts, footnote 197, *supra*, p. 426

²⁵⁹ This is said with the reservation that except two the TEL companies are *mutual* insurance companies.

2.7.2 Case *AOK Bundesverband* Once Again

In discussing the justification of TEL under Article 86(2) EC I first refer to my overall presentation thereof.²⁶⁰ Second, I recall that the TEL-scheme is a law-based social security system covered by Article 137(4) EC that includes certain, and perhaps over time slightly increasing, elements of competition. Furthermore, it is a system, an integrated whole in itself. The contributions and the single TIR are essential pillars of this whole, also seen from a legal angle. The system had evolved over a period of thirty years until the early 1990s without anybody dreaming of EC (or even national) competition rules. In any case, the system has to prevail over the details, and not vice versa, while this does not pre-empt a legal assessment of the contribution and TIR agreements under Article 86(2).

This ‘motto’ above (the system prevailing over its details) finds a direct correspondence, I maintain, in case-law in the form of *AOK Bundesverband*.²⁶¹ In his opinion Advocate General Jacobs described the case, as follows:

1. These four joined cases raise a number of questions concerning the compatibility with the Community competition rules of the arrangement, provided for by statute, whereby the leading associations of sickness funds in Germany collectively determine the maximum amounts (known as ‘fixed amounts’) paid by sickness funds towards the cost of various types of medicinal product. Insured patients are left to pay the excess cost of any prescribed product which is priced above the amount thus fixed.

A subtle but significant message is in the last sentence above: ‘Insured patients are left to pay the excess cost...’. The viewpoint clearly tends towards or even is of private insurance law. I do not maintain that this would dominate the reasoning of the AG but I note it as a background factor. Besides, we also meet this ‘suffering’ patient in the first ruling proposed by the AG (that the Court did not sign). However, the AG continued by stating the legal framework in EC law, i.e. how

2. ‘...The questions referred by each of the national courts differ somewhat in formulation and scope. When taken together, the issues which they raise include in particular whether sickness funds are undertakings and therefore subject to the Community competition rules; whether the decisions of their leading associations to set fixed amounts are capable of breaching Article 81 EC; and, if so, whether those decisions might be defended by reference to Article 86(2) EC.

After this legal analysis the AG directly moved on to the analysis of the criteria of an undertaking under Article 81 EC. The approach of the Court was different. It first

²⁶⁰ See the previous section.

²⁶¹ Officially it is joint cases *AOK Bundesverband*, *Bundesverband der Betriebskrankenkassen (BKK)*, *Bundesverband der Innungskrankenkassen*, *Bundesverband der landwirtschaftlichen Krankenkassen*, *Verband der Angestelltenkrankenkassen eV*, *Verband der Arbeiter-Ersatzkassen*, *Bundesknappschaft* and *See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co.* (C-264/01), *Mundipharma GmbH* (C-306/01), *Gödecke GmbH* (C-354/01) and *Intersan, Institut für pharmazeutische und klinische Forschung GmbH* (C-355/01) [2004] ECR I-2493. The defendants are medicine companies that challenged the system in determining maximum amounts paid in respect of medicinal products.

noted the national dispute, in terms comparable to what the AG wrote in his paragraph 1 but without referring to the suffering patient.²⁶² The judgment then presented the societal essence as its starting point, as follows:

Economic and social context

3 It is apparent from the orders for reference of the Bundesgerichtshof that, according to Federal Government findings, the costs of the German statutory health insurance scheme have increased appreciably faster than the incomes used as the basis for calculation of contributions, and therefore much more rapidly than the resources of that scheme. Such an increase is stated to be due to a lack of competition between suppliers in the health-care sector, insufficient awareness among insured persons of the cost of treatment and medicinal products, and the inability of sickness funds to influence the choice made between medicinal products whose cost is borne under the scheme. The German legislature therefore adopted a series of measures designed to fill these gaps, one of the measures being the determination of fixed maximum amounts payable by those funds in respect of the cost of medicinal products (hereinafter ‘fixed maximum amounts’).

Thus, the judgment explained first why the system of fixed maximum amounts regarding prices of medicinal products was introduced. The main reason was, of course, saving money. The viewpoint is that in the development of a social security system, not that of a single patient (whose socio-economic situation may vary considerably). The lesson in the judgment continued with a succinct presentation of how the sickness fund system works in practice. The difference in approach between the AG and the judgment partially also explains the difference in the outcome: the AG found that the sickness funds act as an association of undertakings in fixing the maximum amounts and thereby limiting their liability to insured persons; the Judges concluded that fixing the maximum amounts was a fully social activity and the funds therefore did not act in that respect as undertakings in the sense of Article 81 EC. The consequence was that the judgment avoided any discussion under Article 86(2) EC.

Importantly, *AOK Bundesverband* also legitimized a certain dose of competition within a law-based social security system without that system losing its basic character of fulfilling an essentially social function.

2.7.3 Contributions and Technical Interest Rate (TIR) Agreements under the Obstruction Criterion of Article 86(2) EC; Concluding Remarks

Self-evidently the key to the justification of the TEL agreements under Article 86(2) is at this stage only the obstruction criterion, i.e. whether the removal of the jointly defined contributions and TIR would obstruct the TEL institutions from fulfilling their

²⁶² The Court wrote as follows: ‘2. Those questions were raised in a number of actions between the AOK Bundesverband, ... and pharmaceutical companies producing medicinal products ... concerning the determination of fixed maximum amounts payable by sickness funds towards the cost of medicinal products and treatment materials.’ – I highlight that it is not my purpose to neglect the lot of individual patients but the purpose – in the reference to them – is to highlight the difference in the approach between the AG and the judgment.

public service task. This is what one may also call (à la Baquero Cruz) a necessity test.

I observe first that the TEL scheme performs a particular social task of general interest, as did the Dutch pension funds in case *Albany* (paragraph 98). In other words, it is an essential instrument of national social policy on pensions (*Albany*, paragraphs 103 and 105).

By analogy to *AOK Bundesverband* I highlight that, in assessing the single TIR and the agreements on contributions with the refunds in TEL, the starting point must be the essence of the TEL as a social security *system*. In reality its financing and short and long-term financial equilibrium form a whole, the parts of which are not meant to be assessed separately, thus pursuant to Article 81 EC. Accordingly, its justification under Article 86(2) EC must keep the same ‘systemic’ starting point, not that of an individual pension institution or employer who might gain some benefit by the application of EC competition rules. However, from the legal point of view it seems clear that the agreements on the contributions and TIR can be challenged in distinguishing litigation (and by invoking the directly effective Article 81 EC).

Another strongly systemic aspect is that like the German sickness insurance scheme that was subject to judgment in *AOK Bundesverband*, the TEL scheme also includes elements of competition, i.e. in the investment yields and thereby in the refunds of contributions while it doubtlessly is a social security scheme. Resorting to private companies in running the TEL scheme - while strictly regulating their conduct - is a reflection of a fundamental national choice in realizing an elementary part of social security. There is no real societal (and legal) reason why Finland should all of a sudden lose its right to define the fundamental principles of its social security systems (see Article 137(4) EC and *Albany*, paragraph 122). Furthermore, also the ‘mere’ financial equilibrium of a social security scheme enjoys protection under Article 137(4).

A third, in fact a crucial, systemic aspect is that the TEL scheme is only a partially funded system (to the extent of a quarter or a third) whereby the PAYG-part of pensions is run jointly by all the TEL companies and institutions. A further elementary characteristic of the scheme is its earning-related nature whereby the accrual basis of the pensions is uniformly fixed by law.²⁶³ This kind of system definitely requires also having a uniform calculation basis (including contributions) and the technical interest rate TIR. That is why the bill under scrutiny of the Diet perhaps even more clearly than before spells out the obligation of the pension institutions to co-operate. We may, of course, imagine a fully funded earnings-related pension scheme with an institution-related calculation base, technical interest rate included. It would however not be meaningful to collect such a huge sum of money for pension purposes. Such an alternative is out of any serious consideration. Only a state monopoly would be a viable alternative for the present TEL.

In conclusion, the restrictions of competition in the TEL agreements and otherwise in the procedure for fixing the contributions and the single TIR are necessary, in order to

²⁶³ I recall that the decision-making on the funding degree and delimiting the profits of the pension companies are also based on law.

achieve a pension policy characterized by solidarity. If they were to be removed, the TEL scheme could not function in its present form. I would also highlight that the financing of the TEL scheme incorporates national solidarity to a considerable degree, even over generations, next to the joint responsibility of the pension institutions in running the PAYG-part of pensions. I therefore conclude that the obstruction condition (the necessity-test) in the application of Article 86(2) EC is fulfilled, with respect to the TIR and contribution agreements.²⁶⁴ As the final argument in support of this conclusion I refer to the fact that the inherent restrictions of competition at the same time are specific labour market agreements which are clearly comparable, as to their practical effects, to legally binding collective agreements between management and labour.

Ultimately, the transparency lesson from judgment *Commission v. Spain* remains. Thus, if contested in the infringement or other judicial proceedings, Finland must set out in detail – at the latest before the ECJ – the reasons legitimising the restrictions of competition (as well as the ‘dose’ of competition) inherent in the TEL scheme, thus to show above all the fulfilment of the obstruction criterion (necessity test) regarding the contribution and TIR agreements. That task is characterised by both economic and social aspects.

2.8 Summary of Chapter II

The analysis in this chapter shows first the framework which the broad interpretations of ‘economic activities’ and ‘undertaking’ form for social services of general interest. Case *AOK Bundesverband* added in this framework a new concept by introducing the principle of an acceptable dose of competition within a social security scheme without necessarily changing its nature as fulfilling a social (security) function. In *AOK Bundesverband* therefore the conclusion was that the sickness funds concerned were not engaged in economic activities in fixing the maximum amounts for reimbursement of medicinal costs of their insured patients and were therefore not undertakings in the sense of Article 81 (and 82) EC. The ECJ thereby avoided applying Article 86(2) EC. In that judgment one can see a general trend in EC law to respect – in the spirit of Article 16 EC – the intrinsic value of public services in relation to an unrestricted application of EC competition law.

On the other hand, the broad notions of ‘economic activities’ and ‘undertaking’ necessarily imply that many undertaking-run social security schemes and institutions fall under competition rules. This leads to assessing them under Article 86(2) EC. That provision covers, as to its letter, undertakings that are entrusted with the operation of services of general economic interest. In the course of case-law the requirements for the application of this provision (regarding the obstruction criterion)

²⁶⁴ Other restrictions, thus those on the market freedoms (in practice right of establishment, free provision of services and free movement of capital) maybe present in the TEL scheme merit a couple of words. I recall that TEL-companies e.g. need to be licensed by the government. If this requirement is challenged by invoking a forbidden restriction of establishment rights, Article 86(2) EC may offer the channel for the necessary justification. Article 86(2) also includes already textually a general derogation from the Treaty rules, thus also covering then all the market freedoms.

were loosened in the 1990s (especially in *Corbeau* and *Commission v Netherlands*), meaning that the necessary obstruction argument is fulfilled when the performance of the public service task is, without the exclusive rights or privileges concerned, not possible under economically acceptable conditions.

In *Albany* the interpretation of Article 86(2) evolved by introducing the concept of a ‘particular social task of general interest’ and the use of an undertaking as a ‘social policy instrument’ under Article 86(2), thus in reconciling the national public service interest with the competition interest of the Community. The inclusion of a ‘social policy instrument’ in Article 86(2) was later reconfirmed in *Commission v Spain*. These concepts, particularly the latter, were judge-made law (with roots in the opinion of AG Jacobs in *Albany* which corresponds to one source found in the German doctrine) that surpassed the letter (general economic interest and fiscal monopolies) of Article 86(2). Besides, prior to *Albany* that statute itself was generally seen as an exception, consequently subject to a narrow interpretation (*Commission v Netherlands*). Thus, the paradox is that today the ‘general economic interest’ (as interpreted in case-law) is capable of also encompassing purely social services of general interest. However, it is to be underlined that this evolution of the case-law corresponds to the developments of (social) public services since the foundation of the Community. The broad line of interpretation is that the social factor is today clearly on an equal footing with the economic one in the application of Article 86(2).

Chapter II also covers the Finnish Statutory Earnings-Related Pension Scheme (TEL) that is of law-based social security in the private sector, although fully financed by employers and workers. For its main part the scheme is based on pay-as-you-go while the rest is funded by each institution. The scheme implies solidarity aspects extending even over generations. The legal analysis here deals with the restrictions of competition inherent in fixing the contributions and calculation basis, especially the single technical interest rate TIR applied throughout the scheme that is run by seven pension companies and numerous company-level and some sectoral institutions. The contributions and TIR are also subject to agreements between the central social partners (outside the ambit of the Collective Agreements Act) while both the contributions and the TIR are confirmed by a state act. However, while the TEL-institutions also compete based on their investment return, especially in the form of refunds of contributions, and have a possibility of making a regulated profit, it is unlikely that the restrictions of competition would enjoy the state action defence against the application of the EC competition rules. This finally requires its analysis under Article 86(2).

In assessing the TEL scheme under Article 86(2) it is crucial that, given the financing mode of the scheme, it cannot function in a financially meaningful, fair and pension rights safeguarding way without a uniform calculation basis, the single TIR included, thus without the inherent restrictions of competition. This leads to assessing the restrictions of competition as necessary in the sense of the obstruction criterion in the application of Article 86(2) EC. At the same time the scheme is a Finnish application of the principle that a social security scheme may include a dose of competition between institutions running it without that changing its crucially social function, i.e. forming the main part of old-age pensions in private sector. It reflects a choice of a Member State as to the fundamental principles of its social security systems (see Article 137(4) EC and *Albany*, paragraph 122). These reasons, supported by the

specific agreements between the social partners on the TIR and contributions that reflect even a certain delicate balance between capital and labour and are for their practical binding effect clearly comparable to collective agreements enjoying the Albany-immunity, strongly require that the present TEL scheme be regarded as justified, if ever challenged by virtue of EC law, under Article 86(2) EC.

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The Fourth (Synthesis) Article
of the Doctoral Dissertation
‘From Internal Market Regulation to European Labour Law’

**From Internal Market Regulation to *ordre communautaire
social***

Reasoning on European Labour Law

Jari Hellsten (ML)
University of Helsinki

Table of Contents

Index	II
Abstract	III
Introduction	1
 Chapter I	
The concept of <i>ordre communautaire social</i>	7
1.1 The EU's Legal Order and Labour Law as Part of It	7
1.2 Overview of European Labour Law Today	14
1.3 Prologue in Case-law: <i>General Principles of Labour Law</i>	21
1.4 The Substance and Constitutive Elements of <i>ordre communautaire social</i>	26
1.4.1 Overview	26
1.4.2 The EU's Founding Legal Principles; ' <i>Labour Is Not a Commodity</i> '	29
1.4.3 The EU's Social Policy and Upward Harmonisation	33
1.4.4 Respect for Fundamental Rights	35
1.4.5 The European Social Model and Social Dialogue	50
1.4.6 Non-discrimination on the Basis of Nationality	52
 Chapter II	
Economic and Social Factors in the Light of <i>ordre communautaire social</i>; Recapping the Development of Economic and Social Factors from Previous Articles	56
2.1 General Remarks	56
2.2 Collective Redundancy and Transfer of Undertaking (Acquired Rights) Directives	56
2.3 Machinery Safety	58
2.4 Posting of Workers	60
2.5 Right to Collective Action	66
2.6 Freedom of Association; the ITF's Action	76
2.7 Gender Equality; Especially Equal Pay	78
2.8 The Social Dimension in the Context of Competition Rules	82
 Chapter III	
<i>Ordre communautaire social</i> in a Historical Perspective	87
3.1 General Conclusions on <i>ordre communautaire social</i>	87
3.2 <i>Ordre communautaire social</i> and Collective Labour Law. Future Perspectives	90
3.3 The Effect of <i>Laval</i> and <i>ITF and FSU v Viking</i> Once Again	98
3.4 Reform Treaty	102
3.5 Concluding Remarks	109
 Bibliography	110

Abstract

This article is the synthesis part of the research project entitled ‘From Internal Market Regulation to European Labour Law’. The previous articles published in this study have predominantly discussed the relationship and interaction between the economic and social factors in these areas of European labour law. This analysis shows in broad terms the gradual emergence of the social factor into the legal edifice of the European Community. Today it is justified, given especially the wide although fragmentary body of secondary EU law, to speak about European labour law as a specific field of EU law. However, the generally underdeveloped nature of collective labour law remains salient, notwithstanding the fact that European Social Dialogue has emerged and resulted in several directives based on the agreements of the European social partners, as well as in three free-standing European collective agreements.

Progress in statutory European collective labour law requires unanimous decision-making. The pending cases *Laval* and *ITF and FSU v Viking*, however, present a clash between the right to collective action and the EU market freedoms, in particular the free provision of services. These factors direct the doctrine to seek new ways to explain the role and status of collective labour law in particular within the European legal Union. Obviously the interplay of the economic (the market freedoms) and social factors (collective labour rights) is not sufficient in that respect. The author therefore adheres to the concept of *ordre communautaire social*, consisting of the leading premises and principles underlying European labour law. It has also meant development since establishing recourse to ‘general principles of labour law’, as the ECJ has done in early case-law. Its constituent elements can be tentatively claimed to cover the principle that ‘labour is not a commodity’ (linked to the leading legal principles in Article 6(1) EU), improvement of working conditions as the leading principle of the EU’s social policy, respect for fundamental rights (including international ones), the European social model (with a prominent role for collective agreements) and the traditional common market principle of non-discrimination. Breaching these principles should also lead to losing legal protection in EU law.

This article discusses each of the five constituent principles of *ordre communautaire social* and includes an assessment of Collective Redundancy and Transfer of Undertakings Directives, machinery safety, posting of workers, the right to collective action, freedom of association, equal pay and the social dimension in the context of competition rules. This assessment generally shows that an *ordre communautaire social* assessment is a useful tool in shaping the role and status of these features of the EU’s legal order.

This article argues that in future the EU will probably be bound to a legal framework in the field of collective labour law, the emergence of which will be dictated by the Europeanization of the economy in the long run. At present it seems to take shape in a combination of case-law, the EU Charter of Fundamental Rights and the effect of the international labour law agreements. *Ordre communautaire social* may serve as a legal-ideological basis for such a framework.

From Internal Market Regulation to *ordre communautaire social*

Introduction

This article is the fourth and last in a research project entitled ‘From Internal Market Regulation to European Labour Law’. The main underlying idea of its previous publications* has been the role of and interaction between the economic and social factors in EC labour law; see in particular Chapter II of the first article: ‘Social and Economic in EC Law; Pyramid (Hierarchy) Thinking’. This article is not a simple summary of the earlier writings but tries to give a more general view of the development and status of European labour law. However, the hypothesis is that the roles and interaction between the economic and social factors is always important in understanding and exploring EU labour law, while it obviously is not sufficient for an EU labour law paradigm at the same time, at least in relation to market freedoms and competition rules. Such a paradigm would cover founding premises and principles or otherwise constitutive elements on which it is possible to construct and elaborate the ‘real’ social constitution of the Community. This paradigm can be called the *ordre communautaire social* (hereinafter also ‘OCS’), *mutatis mutandis* the concept of public policy (*ordre public social*) as used in the French social and labour law tradition. This is what I try to introduce in the first chapter by discussing its tentative significance. Suggesting elements for such a newly-formulated paradigm unfortunately cannot genuinely take place without first discussing the nature of European labour law as a legal order and its place in the whole Community’s legal order. Accordingly, the main features and components (legal acts) of European labour law first need to be counted. I have to keep these discussions at a general level.

Given my earlier writings, some of the audience might feel that the attempt to shape a new paradigm even beyond the level of the EU’s ‘social constitution’ (normally understood as leading labour law principles in the primary EU law) is simply too grand an objective, ‘beyond’ meaning essentially the impact of international labour

* The first article, ‘On the Social and Economic Factors in the Developing European Labour Law’, published in 2005 (the National Institute of Working Life (Sweden), Work Life in Transition 2005:11; <http://www.tsr.fi/files/TietokantaTutkittu/2007/107023Loppuraportti.pdf>) briefly discussed the genesis of the social dimension in the Community, and the Collective Redundancy and Transfer of Undertakings (Acquired Rights) Directives. The second publication, ‘On the Social Dimension in Posting of Workers’, published by the Finnish Ministry of Labour (Publication of Labour Administration (Finland) 2006/301; http://www.mol.fi/mol/fi/99_pdf/fi/06_tyoministerio/06_julkaisut/06_tutkimus/tpt323.pdf), discussed the Posted Workers Directive and (inter alia) the right to strike in EU law. The third article, ‘On the Social Dimension in the Context of EC Competition Law’ (Publication of Labour Administration 2006/323; http://www.mol.fi/mol/fi/99_pdf/fi/06_tyoministerio/06_julkaisut/06_tutkimus/tpt323.pdf), reasoned on (i) the relationship between collective labour agreements and competition rules on the basis of *Albany* and (ii) Article 86(2) EC, including the Finnish Earnings-Related Pension Scheme TEL under Article 86(2). The synthesis article will be available on the internet on the E-thesis website (<http://ethesis.helsinki.fi/en/>) of the University of Helsinki, as well as all the articles on the Work Environment Fund’s homepage: <http://www.tsr.fi/files/TietokantaTutkittu/2007/107023Loppuraportti.pdf>.

law. My answer is twofold. First, the Court has referred in past case-law to ‘general principles of labour law’, which naturally generates discussion on their meaning and substance now, especially their relationship to economic market freedoms. Second, in the history of the European integration we have indeed seen many other new ideas presented and evolutionary steps taken, such as the adoption of the labour law directives in 1970s on the basis of Article 94 EC as reflecting a change in the social values underlying the Treaty. Time will also show whether this trend will follow the direction outlined in this study. On the other hand, one cannot avoid the impression that the literature does not bring too many recent attempts to describe EU labour law in general or paradigm-setting terms, especially in its relation to market freedoms and competition rules.

Fundamental rights occupy a central place in OCS thinking. While time and space do not allow very detailed reasoning on the fundamental rights as such, the intention is to try to create a fundamental rights view sufficient to explain the position and trends within the main topic. It is of course very pleasing that progress can even be counted recently in the *Cresson* and *Parliament v Council* judgments. Since the latter, the EU Charter of Fundamental Rights has had a sure legal effect even as a non-binding human rights instrument. There is also an implied fundamental rights dimension in *Mangold*. As a modern approach in exploring fundamental rights, this study underscores those enshrined in international labour law, mainly as defined by the ILO and Council of Europe, on the basis of the analysis in the second publication. Thus, the author finds that the EU must also take international labour rights beyond the European Human Rights Convention seriously and makes bold to repeat this approach throughout the study in more than a dozen places.

The second chapter first reiterates the debates on the interaction and relationship between economic and social factors in the previous publications of this study. Thus, I will pick up in brief the Collective Redundancy and Transfer of Undertakings Directives, machinery safety, posting of workers, the right to collective action, freedom of association and the social dimension in the context of EC competition rules. I additionally briefly discuss the possibility of claiming a so-called market wage against a service provider posting workers from another Member State. This has its original roots in the pending *Laval* case but this issue is included in the *ITF and FSU v Viking* case (hereinafter ‘*Viking*’) as well. In the second chapter I will also discuss equal pay, describing only in brief the history of the application of Article 141 EC, mainly as showing the changing paradigm (from a balance between economic and social to a predominantly social precedence) in that field.

My concern will thus be mainly collective labour law. Its main features, freedom of association, the right to strike (in the broad meaning) and right to collective bargaining, are partially located in a grey area where a paradigmatic view of EU labour law is most important. They are natural points of conflict with market freedoms. An especially graphic example is the question of a transnational collective action, which is present in the pending *Viking* case (although only in the form of a letter of the International Transport Workers’ Federation). Further on, I will not entertain the European citizenship. I do not mean to neglect the value of this legal category —on the contrary, one might well maintain that European citizenship would be in perfect harmony with developing true European collective labour law as rights of European citizens. Still, it seems a remote issue indeed. However, so far European

citizenship has played a role outside the hard core of employment law, as in the *Martínez Sala* case in residence rights. In any case, my hypothesis is that at least in relation to market freedoms and competition rules the OCS approach seems to be a fruitful interpretative and doctrinal tool. A further delimitation is that I do not discuss free movement of workers in this synthesis article. I confine myself merely to mentioning The Employment Title in the EC Treaty, given its so far modest direct impact on labour law; however, we will encounter traces of employment policy as in the *Mangold* case in section 1.4.4. The open method of coordination (OMC) I touch on only in a couple of remarks at the end.

The underlying idea in the second chapter will be to consider whether the idea of *ordre communautaire social* has any added value in the areas discussed first regarding the interaction and relationship of economic and social factors. At this introductory stage, it is appropriate to state the basics: the possible conclusions remain open in all the individual issues to be discussed, with the predictable exception that the more underdeveloped an area of EC labour law is (like a strike targeting market wages), the more productive the OCS notion looks. In the concluding remarks I try to shape the value and impact of the OCS approach, especially on the interpretative balancing between economic and social factors.

In the third chapter I will introduce a general characterization of OCS and touch on the question of whether the OCS is a realistic approach to the evolution of EU labour law, including the EEC Treaty, SEA, Maastricht, Amsterdam, (Nice) and the Reform Treaty 2007; the Constitutional Treaty I will mention only occasionally, given its abandonment. From a future perspective, I then pose the question of whether the EU is bound to operate in collective labour law only in a fragmentary and highlighted market-triggered way, promulgating soft law and leaving it to the Judges in Luxembourg to develop European collective labour law judgment by judgment, but in cases arbitrarily coming up from the Member States. Will a full-fledged EU labour law really remain a utopia? My thesis is that in any case the EU has to confine itself to framework legislation only on the hard core of collective labour law (freedom of association, collective bargaining and action) in the foreseeable future (having already issued the Information and Consultation Directive 2002/14/EC); provided that the EU can settle the competence problem of Article 137(5) EC. This handicap is of course essentially mitigated by the fact that the international sources of labour law, notably the ILO and Council of Europe provisions, give and even impose relevant substance on collective labour relations (in particular the right to collective bargaining and action) within the EU as well. Thus one task is to align the internal market regulation with international labour law. Whilst the fundamental social rights on the one hand are an essential part of the OCS thinking and whilst they are directly dependant on international (notably Council of Europe and ILO) provisions on the other, it looks particularly important to pose the question about the usefulness of the OCS thinking regarding this core of collective labour law. This is, however, not to deny the OCS's role in exploring individual EU labour law.

The final EU-constitutional issue to be raised right here is the impact of the Reform Treaty 2007, if it enters into force as one may rather confidently presume in making the EU Charter legally binding, after the failure of the Constitutional Treaty. I have to confine myself here to some elementary questions. There is first the issue of what it would do to the overall balance between the economic and social factors. Would that

balance change with the Reform Treaty that makes the EU Charter of Fundamental Rights legally binding except in Poland and the UK? Next to this, its impact on the OCS as regards the issue of social rights v. market freedoms is a natural extension. Would the Reform Treaty also be the final step in endorsing/maturing a more comprehensive OCS view, especially by rendering the EU Charter legally binding? I will try to answer these questions briefly in the third chapter.

It is also appropriate to touch briefly the background postulates of this research that do not necessarily appear outside this introduction. To begin with, the three articles published earlier are mainly on legal dogmatics, i.e., discussion on case-law and traditional doctrinal debate (sometimes seeking new dimensions). In this synthesis article, the approach has been to articulate and even argue with the partially ideological parameters (such as ‘labour is not a commodity’) and to present a proposal for an EU labour law paradigm. In so doing, the author has been inspired by Snyder’s social theory of law (or, ‘European Community law in context’), ‘an important element in any critical study of European Community law’. He has mentioned (i) institutions, rules, ideologies and processes, (ii) law, the economy and society, (iii) the international political economy and (iv) state forms and legal pluralism (Community law in relation to national law) as its various themes in explaining substantive law.¹ A difference from Snyder’s typology is that, instead of international political economy, this synthesis article confines itself to relying on international human rights treaties (especially within the ILO) that naturally also have their socio-economic roots, like the right to strike. However, any coherent application of the social theory of law to EU labour law must be left for future studies.

Some further remarks may also arise from the dichotomy between Slaughter’s, Stone Sweet’s and Weiler’s ‘purist’ and ‘realist’ lawyers.² The launch of *ordre communautaire social* can also be seen as a ‘purist’ doctrinal attempt to present a paradigm stemming from the ‘EU labour law *Grundnorm*’, established mainly in Article 2 EC (balanced and harmonious development of economic activities) and 136 EC (improved working conditions and references to fundamental rights), and essentially explaining the role and substance of EU labour law and in particular the relationship between collective labour rights and market freedoms. The ‘realist’ lawyer may counter this by saying that *ordre communautaire social* is nothing until the ECJ is persuaded. In that sense it is important to see that legal-ideological developments in the EU normally go slowly, even taking decades (cf. the constitutionalisation process or the emergence and growth of fundamental rights since 1960/70s). The *Grundnorm* must also be seen in and as enriched by its legal-ideological context, even as linked to the Community’s founding legal principles in

¹ Francis Snyder, *New Directions in European Community Law*, Weidenfeld and Nicholson, London 1990, p. 14. Weiler has called Snyder’s approach ‘both manifesto, agenda, and methodology’; and that ‘there is now, embryonically, a European-law sociology and sociology of European law’; J.H.H. Weiler, *The Constitution of Europe*, CUP 1999, p. 229. As an applied reflection of similar legal-sociological thinking, this time in discussing the relationship between the ECJ and national courts, one may also refer to the ‘Beyond Doctrine’ questions (like ‘National Identity’, ‘National and European Political Context’ and ‘The Impact of Legal Culture’ as headings) in Slaughter, Stone Sweet and Weiler (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence; Legal Change in Its Social Context*, Hart Publishing 1998, Prologue pp. x-xiv.

² Slaughter, Stone Sweet and Weiler, footnote 1, *supra*, Prologue p. x.

Article 6(1) EU; see the presentation of *ordre communautaire social* in sections 1.4.1 and 1.4.2, *infra*.

What can be said about European labour law in general terms, following Snyder's concept of a social theory of law freely? Initially, there is no distinct, coherent and generally accepted theory on European labour law precisely but the general state-of-art of European law where the legislator's action stems (or does not, as the case may be) from a multi-layered political framework radically different to that in national law. Since law, often in the form of directives, is commonly fragmentary or more general than nationally, the role of the judiciary, acting under the necessity of deciding, but only on cases brought before it, is crucially more prominent than nationally. How many *sui generis* features that unique legal structure, the European 'legal Community' or 'legal Union' and its legal order, created originally under international law and having intensity of powers, although complementary in the social field, and primacy as its essential characteristics (with a certain direct effect), includes, it cannot however escape general and even constitutional parameters in assessing the law's origin, development, content and impact. Thus, any academic writing or, put more challenging, legal theory on European labour law is also ultimately tied to social realities (otherwise they are useless), as to both actors and substance. This is especially graphic in labour law that, despite any well developed social partnership, incorporates management and labour as opposite pools whose tug-of-war is continuous but who may even drift into serious economic or political struggles. On the other hand, the history of national labour laws shows that such struggles (or, the cold war at one time) have also generated qualitatively new law or legal structures. To summarise, European labour law is especially challenging in a strictly legal sense, because of the combined effect of the unique nature of European law and the tension and settlements inherent in labour law. The original generic imbalance with the 'super-power' of the economic factors and the subsequent gradual emergence and further growth of the social dimension, refined later by the changes in the impact of fundamental rights that are broadly international, characterises European labour law. This law is now also subject to the growing challenges of globalisation. The attempt to establish the *ordre communautaire social* is to be seen above all as a continuing European doctrinal step in the historical trend.

Seen from a legal-sociological or the social theory point of view, European labour law has so far often developed under social partnership and as a project of the leading political circles, where both management and labour have been and indeed are involved. This also has a personal dimension. Thus, the author has worked within trade unions (the European level included) or in close contact with them for more than 30 years and does not want at all to hide or minimize this experience. It has both its value and impact, hopefully imposing no limitations insurmountable by open argumentation. This is even a quasi-theoretical substratum within the complicated European framework described above. Hence, this academic work is both legal reasoning that truly respects the trade union values and an attempt to describe European labour law generally and as it stands —sometimes also as it should stand under legitimate expectations.

On the other hand, one may also find that labour law *sensu lato* is also in some sense its own meta-theory, i.e., a theory about regulating, understanding, systematizing, interpreting and describing both as principles (including constitutional ones, as well as

in terms of individual international fundamental rights) and *in minutiae* the rights and duties of employers and workers and employees (including the setting up of their actual terms and conditions of employment), and of management and labour in a broader collective sense, again even touching international law. Needless to say, it is discussed here on the presumption that in this European context collective labour rights fall within labour law, whatever the definitions may be on the national scene. In this study, the reasoning also tries to break some new ground for a better understanding of European labour law and indeed for its development when that area of law also faces new challenges in clashes between collective labour law and the market freedoms and competition rules, when labour law faces the economic market freedoms in the newly modified internal market and during the lengthy and convoluted EU constitutionalisation process. On the other hand, reliable labour law writings also require openness in thinking about and discussing the arguments of the other side as well as those in differing doctrinal thinking (be it ever so neutral on the face of it, or even neo-liberal). A ‘cold-blooded’ description and interpretation of the case-law of the European Courts instead of one’s own wishes or fears as a starting-point is exceptionally important. I have tried to show this in the three articles published already and this is what I also try to do in this synthesis article. Needless to say, I do not predict the outcome in the pending *Laval* and *Viking* cases, but confine myself to discussing the power and direction of arguments. *

* Case-law is covered up to 16 October 2007.

Chapter I

The concept of *ordre communautaire social*

1.1 The EU's Legal Order and Labour Law as Part of It

The discussion of EU labour law in this article essentially requires a historical approach to be successful. Thus, in considering the present status of labour law in a Community context, an elementary although already worn background postulate is that the Community was once born as a legal-political entity with a crucial focus on economic integration; the European Economic Community based on a functional integration concept. Creation of a Common Market with free movement of goods, persons, services and capital was to be established within that market, functioning on the basis of free and undistorted competition. Social policy and integration had practically no role in Community policies while upwards harmonisation of working conditions was predicted to happen as a result of the functioning of the common market ('the market credo'; article 117 EEC). Even the free movement of workers was a market-bound concept. In crucial social policy fields such as labour law, freedom of association and collective bargaining, the EEC Treaty (Article 118 EEC, now Article 140 EC) foresaw only studies and other cooperation between the Member States. It was self-evident that discussion of EEC labour law was rather limited in such circumstances. Today, after several Treaty amendments and expansion of secondary and case-law, the situation is radically different. However, the subsequent legal-ideological discussion of European labour law, i.e., the discussion on *ordre communautaire social*, necessitates considering this law first from a normative and systemic point of view in this article; thus, to what extent it now corresponds to the criteria of a supranational legal order. This self-evidently leads to stating the basics in the overall legal nature of the EU first.³

The EEC, as well as the EU later, was created by a treaty of sovereign states under international law. However, this had characteristics that made it unique in international law from the outset. The nascence of a new legal order and its main characteristics had already been stated in *Van Gend en Loos*⁴ in 1963, thus also

³ The Reform Treaty of June 2007, planned to come into force in 2009, does not change the basic nature of the Community, although it makes the EU Charter of Fundamental Rights legally binding (outside the UK). I will deal with it in section 3.5, *infra*.

⁴ Case 26/62 *Van Gend en Loos* [1963] ECR 1. The historic passages read: 'The conclusion to be drawn ... is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subject of which comprises not only the Member States but also their nationals.'

Independently of the legislation on Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.'

Soon after, in case 6/64 *Costa v. ENEL* [1964] ECR 585, the ECJ established the principle of the primacy of Community law, thus even over-riding national constitutions.

covering the rights and duties of the nationals of the Member States. In the *EEA I* opinion, the ECJ further described the nature of the Community's legal order in 1991 as follows:

[T]he EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, in particular, the judgment in Case 26/62 *Van Gend en Loos* [1963] 1). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.⁵

In the same opinion, the ECJ strongly underlined and defended the autonomy of the Community's legal order (paragraph 35), being itself its final guardian as an EU constitutional court. Still, basis in a constitutional charter, rule of law, conferred powers 'in ever wider fields', autonomy, primacy of Community law⁶ and the direct

In Case C-294/83 *Les Verts* [1986] ECR 1339, paragraph 23, the ECJ emphasized the Community as one based on the rule of law, and described the EEC Treaty its 'basic constitutional charter'.

⁵ Opinion 1/91 on the draft *European Economic Area* [1991] ECR I-6079, paragraph 21. This opinion is itself a graphic example of the autonomy and power of the new legal order. Schermers has recalled that if, before the Treaty of Rome, 19 sovereign states (12 Member States of the Community and 7 EFTA countries) 'had reached an international agreement (with or without the help of an international institution) no one would have accepted the possibility of an international organ to prevent such an agreement from entering into force. Today the standing of the Community is such that its Court of Justice can prevent 19 sovereign states from accepting particular rules in an international agreement'; see Henry G. Schermers, case annotation on Opinion 1/91 of the Court of Justice, CMLRev. 29, 1992 p. 1004.

⁶ The Italian and German Constitutional Courts have expressed reservations regarding primacy over national constitutional rights. Thus, in 1974 the German Court in its *Solange I* decision (37 BVerfGE 271, English translation in [1974] 2 CMLR 540) found that Community law did not entail adequate protection of fundamental rights and preserved the right to scrutiny in that respect under the German constitution. In its *Solange II* decision (73 BVerfGE 339, English translation in [1987] 3 CMLR 225), the Constitutional Court noted progress in the protection of fundamental rights by the Community and held that it would cease reviewing Community law for its compatibility with fundamental rights in the German constitution 'so long as the European Communities, and in particular in the case law of the European Court, generally ensure the effective protection of fundamental rights as against the sovereign powers of the Communities'. In its *Maastricht* ruling (89 BVerfGE 155, English translation in [1994] 1 CMLR 155), the Constitutional Court emphasized i.a. its ultimate power to decide on the limits of the Community competence (judicial *Kompetenz-Kompetenz*) which certainly cannot be said to serve the unity of Community law. Later the Court in substance upheld the line in *Solange II* (order of the Second Senate of 7 June 2000, 2 BvL 1/97) in the so-called banana litigation. However, despite these reservations one may note that the primacy of EU law (certainly like the direct effect) has also been accepted 'everywhere, at least for most practical purposes', Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in Craig and de Búrca (eds.), *The Evolution of EU Law*, OUP 1999, p. 208. Later he still refers to existing reservations as to the autonomous validity of Community

effect of a whole series of provisions⁷ are the essential legal characteristics of the Community, making it a unique legal order in international law.

This constitutional structure is the basis of the material economic core in that legal order; i.e., functioning of the internal market freedoms and competition rules, also called the European Economic Constitution.⁸ It means – in a nutshell – free movement of goods, workers, services and establishment, and capital, complemented by competition rules that may also bind the Member States. We may generally ignore the strictly framed exceptions in principle (those established on public policy grounds in the Treaty and those often called ‘rule of reason’ exceptions) to free movement rules here. It suffices to note that, as developed in consistent case-law, ‘rule of reason’

law and the supreme legal authority of the EC Treaty, ‘not indisputably granted by the courts and political institutions of the Member States’ (*ibid.*, p. 209).

As to the judicial *Kompetenz-Kompetenz*, Weiler has forcefully defended its existence in the hands of the ECJ, mainly on the basis of Article 230 EC (on annulling Community acts i.a. by lack of competence); Joseph Weiler, *The Constitution of Europe*, CUP 1999, pp. 298-317. In case 66/80 *SpA International Chemical Corporation* [1981] ECR 1191, paragraph 12, and case 314/85 *Foto Frost* [1987] ECR 4199, paragraphs 15 to 20, the ECJ preserved to itself the prerogative of declaring a Community act (law) void. The reasons were mainly legal certainty, unity of Community law and ‘a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions’, established in Articles 230, 234 and 241 EC (*Foto Frost*, paragraph 16).

⁷ There is no need for the purposes of this article to explore in detail the limits and consequences of direct effect (with its conditions; according to settled case-law sufficiently precise and unconditional provisions may in principle have it). Thus, in brief, for direct effect (thus in general, not just for that of directives) Ojanen refers to a definition of Prechal as the ‘obligation of a court or another authority to apply the relevant provisions of Community law, either as a norm which governs the case or as a standard for legal review’; Tuomas Ojanen, *The European Way*, Gummerus 1998, p. 258. The direct effect of sufficiently precise and unconditional provisions of directives does not cover horizontal relations between private parties (case 152/84 *Marshall I* [1986] ECR 723, paragraph 48) while directives always have the interpretation effect; see, for instance, the joined cases C-397/01 to C-403/01 *Pfeiffer et al.* [2004] ECR I-8835, paragraphs 108-120. For the conditions and contents of the interpretation effect, see Ojanen, pp. 181-237.

⁸ On this concept, see, e.g., Miguel Poiarés Maduro, *We the Court, the European Court of Justice and the European Economic Constitution*, OUP 1998; for his conception, see further the discussion in section 3.1 (at footnotes 259 to 263, *infra*). Joerges has described the original economic constitution as follows: ‘[T]he fact that the agreement made among the founder states resulted in the development of a Treaty dominated by very strong anti-interventionist policies, and thus favoured the establishment of a liberal economic regime, has been interpreted as “the cunning of reason” The interpretation of the EEC Treaty as an *economic constitution* committed to the advancement of market integration and the achievement of the principles of a market economy then gave a theoretical evaluation of this cunning of reason. This brought two results: on the one hand, the Community, through its interpretation as an order constituted by law and committed to economic freedoms, acquires a legitimacy that protects it against all attacks motivated by democracy theory or constitutional policy ... On the other, the restriction of Community powers provokes an effect of blocking social policy moves considered illegitimate from the point of view of neoliberal order theory ...’ (italics added); Christian Joerges, *The Market without the State? The ‘Economic Constitution’ of the European Community and the Rebirth of Regulatory Politics*; European Integration online Papers (EIoP) Vol. 1 (1997) N° 19, p. 2. The concept of Joerges can be to a certain extent contested at least by the breakthrough of EU social policy in the Treaty of Maastricht 1992, followed by the Treaty of Amsterdam.

restrictions on free movement can also be justified by overriding requirements related to the public interest, provided that these restrictions are not discriminatory, respect guarantees given in the home state (mutual recognition), are appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it (proportionality).⁹ As to the relationship between the internal market and the social area, functioning of the internal market was originally and formally still is also seen as a partial source of upwards harmonisation of working conditions as reflected by Article 117 EEC and Article 136 EC, third sub-paragraph. Functioning of the internal market was the official justification of the labour market directives of the 1970s, with a legal basis in Article 100 EEC (now Article 94 EC; see the first publication, Chapter I.2).

Furthermore, fundamental rights, legally a corollary of the rule of law, have been an integral part of general principles of Community law since the *Stauder* case in 1969.¹⁰ Their growing impetus in the legal edifice of the Community will be discussed below, especially in sections 1.4.4 and 3.4. Otherwise it suffices to note here that the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') has 'special significance' in defining fundamental rights the observance of which the Community Courts ensure.¹¹ However, this firmly anchored 'special significance' doctrine – in fact, by definition – does not exclude the full effect of the other international human rights commitments of the Member States under Article 307 EC, first paragraph, or under the recognised effect of general international law, especially where all the Member States have adhered to an international treaty, as indeed is the case of the ECHR, as well as the ILO Conventions No. 87 and 98 in the social field.¹²

⁹ For the 'rule of reason' exceptions, see, e.g., Annette Schrauwen (ed.), *Rule of Reason. Rethinking another Classic of European Legal Doctrine*, Europa Law Publishing 2005. In the field of free provision of services, see, e.g., case C-369/96 *Arblade* [1999] ECR I-8453 (explored in section 1.2.3 et seq. of the second publication), in the field of free movement of goods case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649 (also present in case *Schmidberger*, paragraph 78, discussed below i.a. in section 3.1), of establishment case C-208/00 *Überseering* [2002] ECR I-9919 (for *Überseering*, also see footnote 255, *infra*) and of capital case C-484/93 *Gustafsson and Svensson* [1995] ECR I-3955. Free movement of workers concentrates on the realisation of equal treatment for which see, e.g. case C-281/98 *Angonese* [2000] ECR I-4139. The minor differences in justifying restrictions to market freedoms are not immediately relevant. – See also the discussion of the market freedoms and the European economic constitution in section 3.1, *infra*. – As to competition rules, it suffices to note how Article 81 EC 'constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market' (case C-126/97 *Eco-Swiss* [1999] ECR I-3055, paragraph 36).

¹⁰ Case 29/69 *Stauder* [1969] ECR 419. One finds a brief explanation of fundamental rights as general principles of EU law in AG Stix-Hackl in case C-36/02 *Omega* [2004] ECR I-9609, paragraphs 48 to 66. Next to Article 220 EC, Article 6(2) TEU is a demonstration of their pivotal role in the Community. See also the comment by Tridimas at footnote 54, *infra*.

¹¹ See for this special significance doctrine e.g. case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71, and case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 35.

¹² For the international treaties under Article 307 EC, first paragraph, see especially the position of De Schutter in section 2.5, at footnote 204, *infra*. As to the recognised effect of general international law in EU law, see in particular cases C-286/90 *Poulsen* [1992] ECR I-

What then is the status and role of labour law in terms of the same constitutional structure of a legal order, i.e., the EC Treaty as the constitutional charter (and thus also the basis for secondary law), autonomy, the independent powers of the Community, primacy, direct effect and the rule of law with fundamental rights as its corollary? Can we, under these criteria, speak meaningfully about EU labour law as a legal order as well as about *ordre communautaire social* as we do of European economic constitution?

To answer the latter question first, it is important to note that there is in principle no wholly separate 'labour law' regime within Community law as to the above constitutional structure as there is a separate Social Charter within the Council of Europe. There is one set of founding legal principles in Article 6(1) EU and only one EC Treaty (a framework treaty with a Social Chapter), one set of legislative instruments of secondary law, one type of primacy, a uniform dimension of direct effect (or lack of any horizontal direct effect of directives), an inherently coherent principle of the rule of law and fundamental rights as general principles of Community law, one type of autonomy and one attitude in accepting the effect of the rights and obligations in international law in the EU.¹³ As such, social policy and internal market rules are equally enumerated as Community activities in Article 3 EC,¹⁴ and raising the standard of living and quality of life, economic and social cohesion and a high level of employment and of social protection are counted as the basic aims of the Community, together with the harmonious, balanced and sustainable development of economic activities, in Article 2 EC. Besides, Article 136 EC still refers to upwards harmonization and the principle of improved working conditions. There is, however, a difference between the 'economic constitution' and the 'social constitution', so that the basic economic rights and obligations are already broadly established in the EC Treaty (although it is a framework treaty, *traité cadre*), whereas in the social field (next to free movement of workers) only equal pay in Article 141 EC 'bites' directly and the Community's legislative competence is supportive and complementary to that of the Member States (Article 137(2) EC). Another difference

6019, paragraph 9, and C-162/96 *Racke* [1998] I-3655, paragraph 45, and the discussion in section 4.6 of the second publication. As a recent example of a discussion of international treaties other than the ECHR, see case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 37, where the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child are mentioned by the ECJ as instruments to be taken into account in applying the general principles of EU law. The judgment also highlighted the European Social Charter as a source for greater protection of the rights of the child than that provided for by the directive concerned (paragraphs 39 and 107). The ILO conventions I have discussed in sections 4.4.2 and 4.5 to 4.7 of the second publication. That the ECJ takes the ILO obligations seriously is highlighted by cases C-158/91 *Levy* [1993] ECR I-4287 and C-203/03, *Commission v Austria* [2005] ECR I-935. For the former, see the comments in footnote 241 of the second publication; for the latter, see footnote 250 of the second publication. See also the remarks in section 2.5, *infra*, at footnotes 201 to 213.

¹³ As to the effect of general international law, see the cases in the previous footnote. I highlight this receptive attitude here, while the effect of international law will show up later, linked to respect for fundamental rights and in the discussion of collective action in section 2.5, *infra*.

¹⁴ Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 54, notes how social policy and competition rules in the internal market are of the same rank, although influenced by the Community's tasks in Article 2 EC.

is in the legislative powers, so that many secondary labour law issues still require unanimous decision-making, such as social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers, including codetermination.¹⁵

Concerning freedom of association and the right to collective action, no directive can be issued under Article 137 EC, but only on 'representation and collective defence of the interests of workers and employers' (Article 137(2)(f), which may include collective bargaining. It is arguable whether a directive on the right to collective action and freedom of association would be possible under Article 94 or 308 EC in any case. In the *Germany v Parliament and Council* judgment in 2000, the ECJ laid down strict conditions for the use of Article 95 EC as a legal base (and this normally applies by analogy to Article 94 EC); it must be linked closely to the functioning of the internal market or genuine distortions of competition.¹⁶ These basic labour rights in any case fall under the ambit of EU law in principle.¹⁷ As to fundamental rights, Article 136 EC refers to the European Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers, drawing them into the sphere of EU law.¹⁸ In so doing the EC Treaty works as a 'constitutional charter'. Whatever the Treaty says, there is also the EU Charter of Fundamental Rights that arguably puts social rights on an equal footing with the economic ones, rights which may also have a direct effect as general principles of Community law as the *Mangold* judgment shows.¹⁹

In sum, despite the differences in detailing the basic economic rights and duties (the latter in such things as competition rules) in the EC Treaty and the differences in the Community competence, it is fair to state that, from a systemic point of view, social policy and labour law are now an integral part of the EU's legal order (although

¹⁵ Under Article 137(2) EC, second subparagraph, a qualified majority decision may follow a preceding unanimous decision on its use, while not regarding social security and social protection.

¹⁶ See case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419. Phil Syrpis, *Smoke Without Fire: The Social Policy Agenda and the Internal Market*, (2001) 30 ILJ, p. 277, concludes from this judgment that '...internal market legal bases such as Articles ...94 and 95... may no longer be used for the adoption of social legislation; unless the legislation eliminates differences between the laws of the Member States which are capable of either impeding free movement or creating appreciable distortions of competition.' He further asserts that the Collective Redundancies Directive 'would be vulnerable under the approach' adopted in this judgment (*ibid.*). See also the position of Wedderburn that Article 94 could serve as a basis for a directive on freedom of association, expressed in 1992, and a lenient position on or estimation of Ryan, both in footnote 286, *infra*.

¹⁷ See, e.g., the reasoning of AG Mengozzi regarding collective action in case C-341/05 *Laval*, paragraphs 48 to 57. See also section 4.3 of the second publication.

¹⁸ For the 1989 Community Charter, see judgment *Chacón Navas*, and for the European Social Charter, see judgment *Parliament v Council*, both discussed in section 1.4.4, *infra*. The reference in Article 136 EC to the 1989 Community Charter also implies that United Kingdom (as well Austria, Finland and Sweden) adhered to it, even *de jure*. Furthermore, there are no exceptions from Article 136 provisions regarding the 12 new Member States.

¹⁹ For fundamental rights and judgment *Mangold*, see section 1.4.4, *infra*. As to characteristics of the EU Charter, see the scholarly comments in section 1.4.4, *infra*, at footnotes 100, 101, 120 and 121.

materially fragmentary; see the next section). Political and policy level reality is another thing.

Consequently, when considering the EU's labour law as such a regime (but not a priori as a separate one), the general criteria for distinguishing a unique EU legal order under international law as they stem in particular from *Van Gend en Loos*, *Costa v ENEL* and the *EEA I* opinion, apply in principle to its labour law as well. This means that primacy, direct effect and the rule of law (with fundamental rights falling under general principles of Community law as its corollary) also form the core EU principles in labour law. To mention the most obvious examples, in *Mangold* (on age discrimination, explained in section 1.4.4, *infra*) we find general principles, primacy and the direct effect of Community law, and in *Defrenne II* the direct effect of Article 141 EC. Furthermore, the recognition of the EU Charter of Fundamental Rights since the *Parliament v Council* of 27.6.2006 judgment (see section 1.4.4, *infra*) as a source of EU law is a further step broadening and strengthening the role of fundamental social rights especially and thus justifying the EU's labour law as a more complete legal order. Next to these aspects, there is a considerable body of autonomous but treaty-based secondary labour law (see the next section), with directives on Transfer of Undertakings (Acquired Rights),²⁰ Posting of Workers, European Works Councils and workers participation as a precondition for a European Company (*Societas Europaea*) under Regulation 2157/2001 at the top as to the cross-border effect (which is the basis of the internal market effect). For the rest, this secondary law causes real changes in the legal position of workers (and their collectives) throughout the Member States via national law. It is not just programmatic like recommendations, but 'hard law'. This secondary law as a whole certainly forms an element distinguishing EU labour law within international labour law. Furthermore, the Treaty-based social dialogue in the EU is another distinctive element. Thus, certain elements of primacy and direct effect, fundamental rights as a reflection of the rule of law, an extensive body of autonomous secondary law based on the 'constitutional charter', the EC Treaty, and social dialogue justify calling EU labour law a distinctive supranational legal order (or, a supranational labour law order), and at the same time an elementary part of the EU's overall legal order. This is the conclusion at a normative and systemic level. This is also the main answer to my question concerning the role and status of labour law in the light of the overall constitutional structure of the EU.

Indeed, within labour law the neighbouring international structures, the Council of Europe with its Social Charter and the International Labour Organisation with its corresponding material Conventions (mainly Nos. 87 and 98), form a useful mirror in considering the EU's labour law as a supranational legal order. The difference is that the EU's system is one of 'hard law' where the judgments of the Community courts are ultimately binding, whereas the Council of Europe and the ILO must rely on 'name and shame'. It is hardly conceivable that an EU Member State would not at all comply with a judgment of the Community courts,²¹ whereas experience shows that

²⁰ I recall that the reasoning in the first publication led to establishing the cross-border applicability of that directive, see section II.2.2 of the first publication.

²¹ Regarding obligations under the EC Treaty, the ECJ may impose a lump sum or penalty payment against a Member State not complying with a judgment of the ECJ (Article 228(2) EC); see case C-177/04 *Commission v France* [2006] ECR I-2461.

some Member States are reluctant to comply with the Council of Europe and ILO standards,²² being hardly burdened by the consequences.

Historically, since the beginning with the Treaties of Paris and Rome, the legislative activity on labour law in 1970s, the Single European Act and the Treaties of Maastricht and Amsterdam, complemented by the secondary law and social case-law (such as *Defrenne II*, *Albany*, *Mangold* and the pending *Laval* and *Viking* cases) are the EU-internal milestones on the route towards a supranational EU labour law order. Whereas I find the use of that concept justified, it is logical to discuss its leading premises and principles that together form its legal-ideological paradigm, although right here just provisionally justified as an *ordre communautaire social* that can also be seen as correspondent to the ‘European economic constitution’. Thus, dealing with its tentative constitutive elements and impact will follow in this chapter and an ‘OCS assessment’ of certain main topics in the earlier publications of this study project in the second chapter. Both areas form the research task of this article, eventually leading to mapping the elements and principles conclusively in the third chapter (regarding especially collective labour law), which altogether are labelled *ordre communautaire social*. Before moving onto these tasks, it is appropriate to offer an overall picture of the EU’s labour law today.

1.2 Overview of European Labour Law Today

Some terminological remarks are first necessary in initiating a description of EU labour law. What do we mean by the notion of European labour law? Does it encompass only the primary and secondary labour law of the EU or does it also cover the national law implementing EU law and, furthermore, the national law (in the broad sense, thus, case-law and international obligations of the Member States included) filling a given legal ‘space’ alone?²³ Robert Rebhahn has asserted, albeit in the context of collective labour law and the development of a genuine European Labour Law, that

Contrary to a widespread but misguided usage, European (Labour) Law does not consist solely of the European Union’s legal acts, but also and primarily of the law of the Member States.²⁴

This statement is naturally true in many senses. European directives acquire their full force only by implementation and reinforcement in the Member States; the EU lacks enforcement machinery in general terms (although its Commission in particular may order fines as a competition authority); and it has ‘omitted’ or left important legal areas for the Member States within labour law as well, the collective labour law being the manifestation of this. On the other hand, a direct and interpretive effect of the primary and secondary EU law exists, with pay equality as its flagship (Article 141 EC), and the ‘widespread and misguided usage’ of the term ‘European labour law’ has

²² See footnote 226, *infra*, regarding the United Kingdom, and footnote 197, *infra* for Germany.

²³ By this I mean a situation where a given legal phenomenon depends only on national case-law and the EU lacks enactments.

²⁴ Robert Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective* (Part I), IJLLIR Volume 19/3, 2003, p. 273.

produced so many books, articles, seminars and rumination that it is appropriate to call it the mainstream. European labour law understood this way, covering the EU enactments and charters and various other forms of soft law (so far), is what I mean by European labour law. One could even call it genuine European labour law created by the EU. It still has the important feature that it is what the Member States have been able to produce together within the EU as gathered nowadays within the Council and the European Parliament. Another aspect is that the EU does not act in an international vacuum (beside being itself a creature of international law originally) but is an actor in the international field and, more importantly here, is bound to respect the international labour law obligations adopted by the EU Member States.²⁵

This approach does not mean to neglect the necessary implementing and reinforcing national law in an EU context, but it cannot stop with the idea that European collective labour law in particular is primarily national. National law here means, as Rebhahn does in his article, purely national enactments, thus excluding the international labour law commitments of the Member States and omitting the Community Charter of Fundamental Social Rights of Workers 1989 and the EU Charter of Fundamental Rights of 2000.²⁶ Not just individual but also collective labour law is already and irrevocably a real EU issue as the pending *Laval* and *Viking* cases demonstrate regarding the right to collective action.²⁷ Whatever scholars and other participants in the European legal audience expect, fear, like or dislike, and however residual the Community's legislative competence in collective labour law is, the ECJ cannot avoid operating with a European concept of the right to collective action and strikes in these cases which it has to 'borrow' from the ILO (and, partially, from the European Social Charter),²⁸ as well as to draw on the constitutional traditions of the Member States. It is the conflict with the fundamental cross-border *economic* freedoms (in these cases the freedom to provide services) that imposes this emergence of a qualitatively new step in the EU's *social* dimension and history.

The reasoning above shows the direct connection with content that the terminology inevitably achieves in the course of roughly a page, at least regarding collective labour law. However, the same basic remarks concern individual labour law,²⁹ where it is easier to stick to the narrow definition of European labour law: primary and

²⁵ See footnote 12, *supra*, and the remarks in section 2.5, at footnotes 201 to 212, *infra*.

²⁶ To avoid any misunderstanding, Rebhahn's article, together with its Part II, (Collective Labour Law in Europe in a Comparative Perspective (Part II), IJLLIR Vol. 20/1, 2004 pp. 107-132), is a good break-down of national legislations on collective labour law in 14 'old' Member States, even amounting to a mini-handbook, but is short of international law aspects.

²⁷ Cases C-341/05 *Laval v. Svenska Byggnadsarbetareförbundet* (Swedish Building Workers' Union), its local union No. 1 ('Byggettan') and *Elektrikerförbundet* (Swedish Electricians' Union), and C-438/05 *The International Transport Workers' Federation (ITF) and the Finnish Seamen's Union (FSU) v. Viking Line*. See the fourth of the second publication. As to the latter case, see also footnotes 154, 186 and 187, *infra*, and the fourth chapter section of the first publication. The opinions of Advocates General are discussed in section 3.3, *infra*.

²⁸ See footnote 294 of the second publication.

²⁹ The demarcation between individual and collective labour law is blurred, as e.g. the Collective Redundancy Directive shows. It is sometimes under 'European Labour Law and the Enterprise' (Bercusson Butterworths 1996) or 'Restructuring of Enterprises' (Blanpain Kluwer Law International 2000), both in books entitled 'European Labour Law', but not covered by the heading 'Collective Labour Law'. I put it later in this section under the 'information and consultation' aspect of secondary EU law.

secondary EU law, with the corollary EU Charters. The treaty definition in Article 137(1) EC is that, since Maastricht, the EU shall ‘support and complement’ the activities of the Member States in the field of labour law (while Article 136 EC, third paragraph, still repeats the old ‘common market credo’ as a source of harmonisation). This secondary nature does not always hold true, given the detail of the Transfer of Undertakings (Acquired Rights) Directive and the applications of the concept of indirect discrimination on the grounds of sex, for instance. The present Article 137 leaves a lot of opportunity to enact minimum conditions (instead of harmonisation), especially in the fields covered by the elastic concept of ‘working conditions’ in Article 137(1)(b), but non-enactment, especially on temporary work, reflects the political impasse in the legislative process.

Leaving aside further terminological discussion, accounting in brief for the instruments of EU labour law is ahead in this article. Nevertheless, its generally fragmentary nature and an underdeveloped collective labour law (in addition to social dialogue) suggests or encourages to new efforts to conceptualize EU labour law, given the developments throughout the integration process.

Thus, some half a century after the Treaty of Rome coming into force, European labour law now consists of the Social Title and Chapter in the EC Treaty itself, accompanied by the references to a high level of employment and of social protection, equality between men and women, raising the standard of living (Article 2 EC)³⁰ and social policy (Article 3(j) EC), as well as by the general non-discrimination provision on grounds of nationality (Article 12 EC), free movement rules (Article 39 EC et seq.) and the Employment Title (which I do not really entertain further). The Treaty itself is a result of fragmentary developments with some embarrassingly contradictory results. The most salient is the fact that the Treaty promotes European social dialogue, but foresees that the Community will not adopt directives under Article 137 EC on basic issues of collective labour law: pay, the right of association, and the right to strike or to impose a lock-out (Article 137(5)). A formal part of the contradiction is the fact that Article 136 EC refers to the European Social Charter and the 1989 Community Charter of Fundamental Social Rights that include both the right to strike and the principle of fair remuneration. Besides, the Member States also confirmed their attachment to these Charters in the fourth paragraph of the Preamble to the Treaty on the European Union. Another issue is that Article 137(5) is subject to different interpretations and obviously does not completely exclude these basic issues from the ambit of EC law.³¹ This contradiction is highlighted by Articles 12 (freedom of

³⁰ As a nuance I recall that the Preamble to the EC Treaty refers to ensuring economic and social progress. The Preamble to the EU Treaty also confirms the Member States’ ‘attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers’ and the determination ‘to promote economic and social progress for their peoples’.

³¹ See, e.g., my reasoning on Article 137(5) under the heading ‘Right to Strike in the Ambit of EC Law?’ in the second publication, section 4.3. Lord Wedderburn held immediately after Maastricht that a Community instrument on freedom of association would be possible on the basis of Article 94 (ex 100) EC. This implies that the right to strike, like freedom (right) of association, is not ‘constitutionally’ excluded from the Community competence by Article 137(5) EC. Lord Wedderburn, *Freedom of Association and Community Protection: A Comparative Enquiry into Trade Union Rights of the European Community and into the Need for Intervention at the Community Level*, May 1992, paragraph 35.1; a stencil for the

association) and 28 (the right to collective bargaining and action) of the Charter of Fundamental Rights. Furthermore, even the Constitutional Treaty would have reproduced this controversy or confusion, as does the Reform Treaty.

However, it suffices here to point out that the EC Treaty itself is subject to interpretation, as is the division of competence between the Community and the Member States. A general notion is that, according to Article 137(1) EC, the Community shall support and complement the activities of the Member States in the various social policy fields in line with the partially rudimentary Article 140 EC). A reasonable interpretation is that the Treaty itself is somewhat ambiguous as to a full-fledged EC labour law being developed (I will discuss this issue mainly in chapter III, *infra*). Since Nice Article 137(2)(a) EC excludes ‘any harmonisation’ in the social policy cooperation/coordination process (and only within that process, I argue), while Article 136 EC still upholds the original harmonisation target: ‘harmonisation while the improvement is being maintained’ is in the first sub-paragraph, ‘the procedures provided for in this Treaty and...the approximation of provisions laid down by law, regulation or administrative action’ is still the legislative tool enshrined in the third subparagraph where the Treaty has even kept the original ‘common market credo’ as a source of harmonisation — an upwards harmonisation arguably also ensuing from the functioning of the Common Market. The notorious compromise result since Amsterdam is to issue minimum directives under Article 137(2)(b) EC so as to achieve the objectives of Article 136.

Whereas the EC Treaty itself is fragmentary (and even unclear) on labour law, not much more can be expected on secondary labour law. However, five main forms of rule can be distinguished: (i) free movement rules; (ii) safety and health provisions, and, within the field of proper employment law; (iii) directives on ‘information and consultation’; (iv) those on ‘working conditions’; the employment law field is then supplemented by non-discrimination provisions, including gender equality (v). This break-down is of course conventional. Working time is sometimes put under ‘safety and health’ (as in the *United Kingdom v Council* case),³² sometimes under ‘working conditions’ as below. I focus on (iii) to (v).

European Commission. I also refer to Lenaerts and van Nuffel who have stated that ‘[i]n some cases, Art. 137 is inapplicable, namely, in the case of pay, the right of association, the right to strike and the right to impose lock-outs’. Lenaerts and van Nuffel (ed. Bray), *Constitutional Law of the European Union*, 2nd ed. 2005, p. 302-303. Thus they do not say that the Treaty is inapplicable. A narrow reading of Article 137(5) is also present in judgment C-307/05 *Del Cerro Alonso*, 13.9.2007, nyr, where the ECJ found that equal treatment and non-discrimination, as applied by the Fixed-term Directive 1999/70, also covers pay provisions in fixed-term contracts in spite of Article 137(5) EC. AG Maduro suggested the reverse; see the opinion of 10.1.2007. The ECJ also read Article 137(5) in the light of Article 136 (paragraph 39); fixing pay levels in general remains a task of the Member States under Article 137(5).

³² See case C-84/94 *United Kingdom v Council* [1996] ECR I-5755. The United Kingdom claimed the annulment of the Working Time Directive on the basis of an allegedly incorrect legal basis in vain. The directive was based on the (then) health and safety Article 118a. The ECJ employed a broad definition of health and safety, basing itself finally on the definition adopted by the World Health Organisation in which all EU Member States were (and are) members (paragraph 15).

The third facet includes the directives on collective redundancy (98/59/EC), the European works council (94/45/EC), employee involvement in European Company (2001/86/EC, to be read in conjunction with the Council Regulation (EC) No 2157/2001 establishing a Statute for a European company) and in European Cooperative Society (2003/72/EC), information on and consultation with employees (2002/14/EC), transfer of undertakings (acquired rights; 2001/23/EC)³³ and information and consultation in the context of takeovers (Directive 2004/25/EC). At the Collective Redundancy Directive the qualification ‘information and consultation’ is appropriate with regard to the substance of the instrument. It is essentially procedural, although its Preamble refers to material harmonisation. The Transfer of Undertaking Directive also includes material clauses, most obviously the transfer of the employment relationships. In this sense it could well be put also under the heading of ‘working conditions’. The information and consultation directive (2002/14/EC) is in general terms a very modest solution of employee involvement compared especially to the national co-determination regimes in force in Germany, Sweden and the Netherlands.³⁴

The fourth facet above (‘working conditions’) includes the Directives on employer insolvency (80/987/EEC, amended by directive 2002/74/EC), fixed-term work (99/70/EC), the safety and health of workers at work with a fixed-duration employment relationship (91/383/EEC), information on employment conditions (91/533/EEC), posting of workers (96/71/EC), part-time work (97/81/EC), working time (93/104/EC, replaced by directive 2003/88/EC; supplemented by the agreement-based sectoral directives 99/63/EC on seafarers’ working time, 2000/79/EC on working time in civil aviation, 2002/15/EC on working time for mobile road workers and directive 2005/47/EC on mobile rail work), young people (94/33/EC) and parental leave (96/34/EC). Protection of individuals with regard to the processing of personal data is subject to directive 95/46/EC, as complemented by directive 2002/58/EC. Of these instruments, those on parental leave, part-time work and fixed-term work were based upon agreements between the cross-sectoral social partners, whereas the directives on seafarers, civil aviation, road and rail work were based on agreements in European sectoral social dialogue. Part-time and fixed-term directives essentially employ the principle of non-discrimination against differing conditions due to part-time or fixed-term work; the part-time directive also promotes part-time work, whereas the fixed-term directive is intended above all to end the abuse of successive fixed-term contracts. The Posted Workers Directive (hereinafter also ‘PWD’) is a legal framework of its own as my second publication shows, but an integral part of EU labour law in any case. The Working Time Directive is relatively weak in a continental assessment (with a maximum of 48 hours per week, although overtime is included) but includes a viable four weeks’ paid annual leave as a minimum.

Within the fifth facet, the Racial Equality Directive (2000/43/EC) combats discrimination based on racial or ethnic origin. The Employment Framework Directive (2000/78/EC) establishes a general framework for equal treatment in

³³ I have discussed the directives on collective redundancy and transfer of undertakings in my first publication (sections I.2.1 and I.2.2).

³⁴ A brief explanation on co-determination laws appears in Robert Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective* (Part II), IJLLIR Vol. 20/1, 2004, p. 120-131.

employment and occupation regarding discrimination on the grounds of religion or belief, disability, age or sexual orientation. Both are based on Article 13 EC, inserted by the Treaty of Amsterdam. Based on Article 141(3) EC, the recent directive (recast) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (2006/54/EC) will replace the existing directive 75/117/EEC on the implementation of equal pay, directive 76/207/EEC on equal treatment in employment, vocational training and promotion, and working conditions (revised by Directive 2002/73/EC), directive 86/378/EEC on equal treatment in occupational social security schemes, directive 92/85/EC on maternity protection and directive 97/80/EC on burden of proof in cases of discrimination based on sex by 2009.³⁵ Still, the most prominent stipulation within equal treatment is the directly effective Article 141 EC on equal pay, although the equal treatment directives are a constant source of litigation and the Article 13 EC directives include a lot of evolutionary potential.

In sum: if we presuppose an abstract ‘European worker’ or employee dependent only on this written *acquis communautaire social* as it stands in secondary EU law,³⁶ it would appear that (s)he is not supposed to be paid by the employer when sick or out of work due to an accident; is never laid-off or dismissed for individual reasons; is without real material protection if made redundant on collective grounds; gets no protection against hindrances to joining a trade union; on the other hand (s)he gets information about conditions in a relevant collective agreement and protection if posted to work in another Member State; is protected as a migrant, part-time or fixed term worker; and (s)he does not have even an individual right to withdraw her/his labour, not even in cases of a clear breach of contract on the employer’s part. (S)he is, however, genuinely protected by Community law concerning health and safety, gender equality and transfer of undertakings, the three salient areas of EC employment law. As to pay, (s)he only gets information but is otherwise dependent only on national law, since no European minimum wage exists. Finally, (s)he is covered by an information and consultation structure. This partial caricature naturally is ameliorated when we take the fundamental rights into account, like freedom of association (Article 12 of the EU Charter) or protection against unjustified dismissal (in Article 30 of the EU Charter). On the other hand, it is fair to note that historically the secondary EU labour law also represents remarkable progress since the first Social Action Programme of 1974. I highlight that I will come back to the question about a full-fledged European and especially collective labour law in section 3.2, *infra*.

As to collective EU labour law, the lack of secondary legislation underlines in general terms its rather under-developed nature (it is one entire class less developed than the EU’s individual labour law), although the European Social Dialogue is enshrined in the EC Treaty and has also brought positive results in the form of three agreement-based cross-sectoral directives and the three sectoral ones mentioned above, as well as the three free-standing European collective (framework) agreements on telework in

³⁵ Equal treatment in statutory social security is still subject to ‘gradual implementation’ according to Directive 79/7/EEC.

³⁶ Hence, I set aside the Treaties, fundamental rights and international law for a while. See however Article 30 of the Charter of Fundamental Rights of the European Union on protection in the event of unjustified dismissal and Article 31 on just and fair working conditions.

2002, work-related stress in 2004 and harassment and violence in 2007.³⁷ This underdevelopment naturally goes back to the division of competencies between the Community and the Member States. The original Article 118 EEC subjected the right of association and collective bargaining between employers and workers only to Commission-promoted cooperation between the Member States. The EEC Treaty was silent on pay. On the other hand, ‘labour law and working conditions’ in Article 118 EEC did not prevent the labour law directives of the 1970s, adopted on the basis of Article 94 EC. The Treaty of Amsterdam reproduced this residual position by leaving, directives on representation and collective defence of the interests of workers and employers on the basis of Article 2(3) of the Maastricht Social Policy Agreement and now in Article 137(2) EC, second subparagraph, including co-determination (Article 137(1)(f) EC), subject to unanimous decision-making unless they fall under Article 137(5), in which case a directive on the basis of Article 137 is obviously impossible. Similarly, Article 95(2) EC excludes Community provisions ‘relating to the rights and interests of employed persons’ from qualified majority voting (QMV). Article 137(2) EC, second subparagraph, accordingly excludes protection of workers where their employment contract is terminated from QMV unless the Council first unanimously decides on resorting to QMV.

EC law also includes two important delimitations of internal market law in relation to labour law. The first is the so-called Monti-Regulation (officially Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States). According to its Article 2, it does not affect the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. The second is the Services Directive (officially Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market). According to Articles 1(6) and 1(7), the directive does not affect labour law, employment and working conditions, collective labour relations and agreements and the exercise of fundamental rights, the right to industrial action included, as recognised in the Member States and by Community law. The Services Directive thus indirectly recognises this list of issues as also protected in Community law. Furthermore, the Directive does not apply to temporary work agencies (Article 2(2)(e)). The legislative history of both the regulation and the directive shows that the Commission originally proposed stipulations affecting labour rights as well.³⁸

³⁷ The works council (EWC) directive 94/45/EC also has to be mentioned as a tool which the Member States could not have hammered out without the Community. The same applies, by definition, to employee involvement in the European Company (SE). These issues can already be said to represent an independent development of EU labour law. The Posted Workers Directive reflects similar development, although with legislative roots in the ECJ’s case-law. The European cross-sectoral agreements are available at http://ec.europa.eu/employment_social/index_en.html. As to agreements by the European industry federations, the recent (12 July 2007) European agreement (the first in the metal industry) between the European Metalworkers’ Federation and the Schneider Electric group on the ‘anticipation of change’ in the group is noteworthy; the Executive Vice President of the group called the agreement a ‘European collective agreement’ that is also filed under the French *prud’homme* regime; <http://www.emf-fem.org>.

³⁸ On the right to strike in the draft Monti-Regulation, see section II.2.4 of the first publication. For the Services Directive, see the country of origin principle and, i.a.,

On the other hand, the pending *Laval* and *ITF & FSU* cases³⁹ also demonstrate that issues not directly regulated by secondary EU law such as the right to collective action and to strike may clash with EC law, particularly its economic freedoms and competition rules. In principle, the same may happen regarding individual labour law issues not regulated by EC law. In EU law, such grey areas exist both in collective and individual EU labour law.⁴⁰ These grey areas emphasize the need to search for and establish constitutive factors and/or concepts both for solving the inevitable interpretation problems by filling gaps and balancing social rights and economic freedoms in a meaningful and socially acceptable way, and for helping overall understanding of EC labour law. This is in functional terms what I try to serve by adhering to and exploring the idea of *ordre communautaire social*. On the other hand, such a framework looks like a useful interpretative tool; e.g., in the case of a contradiction between written EC (secondary) law and fundamental rights, or between the EU and EC Treaties and secondary law. It also has its necessary relations with the legal meta-level, i.e., the ideology behind the law.

1.3 Prologue in Case-law: *General Principles of Labour Law*

Prior to a discussion on *ordre communautaire social* it is appropriate to discuss briefly *general principles of labour law*, well known throughout the Member States. This doctrinal notion is defined nowhere internationally, but it certainly exists as a doctrinal tool and is by definition the most convincing in qualifying *international labour law*. General principles of labour law naturally include for instance the effect of general civil law principles on the contract of employment like a general loyalty

amendments to the Posted Workers Directive in the Commission's proposal COM(2004) 2 final.

³⁹ Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line*. The legal issue is whether free movement rules ban a strike concerning the wages after future reflagging of a Finnish vessel (M/S Rosella) in another Member State (Estonia), planned to be followed by replacement of the predominantly Finnish crew with an Estonian one. The collective action would be realized mainly on the shipowner's vessels other than Rosella. See also the second publication, On the Social Dimension in Posting of Workers, section 4.10.5. See also sections 2.5, 3.3 and 3.3.2, *infra*.

⁴⁰ That the grey area may have deep origins is highlighted by the so-called Supiot report which indicated how the Community has been unable to agree on a definition of the term wage-earner as an example of the 'raw' nature of EC labour law in general. Transformation of labour and the future of labour law in Europe, Final report, para. 4; http://ec.europa.eu/employment_social/labour_law/docs/supiotreport_en.pdf. On the other hand, a Community notion of 'worker' has emerged within free movement; see, e.g., case C-3/87 *Aegegate* [1989] ECR 4459, paragraph 35, which reads (inter alia): 'The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.' That the Member States retain the right to define a 'worker' outside the free movement is recognised e.g. by the Commission's recent Green Paper: Modernising labour law to meet the challenges of 21st century, COM (2006) 708 final, p. 11; as well as in the Transfer of Undertakings Directive 2001/23, Article 2(1)(d); for a definition of equal pay, see case C-256/01, *Allonby* [2004] ECR I-8349; cf. Working Time Directive 2003/88, which includes a definition of 'night worker', 'shift worker' and 'mobile worker', complemented by certain derogations under Articles 17 et seq. but no general definition of a 'worker'.

requirement between the parties, but it is relevant in collective labour law as well. In a Community context it is natural first of all to refer to the *General Union of Personnel (Syndicat Général du Personnel) of European Organizations*, *Amalgamated European Public Service Union (Union Syndicale)* and *Maurissen II* cases as a proof of the existence and recognition of ‘general principles of labour law’.⁴¹ All of them concerned inter alia the right of a trade union of European officials to bring proceedings against the decision of a Community institution (that right was *in casu* recognized only in *Maurissen II*). In each of these cases the Court reasoned on the freedom of association recognized under Article 24a of the Staff Regulations,⁴² asserting the following principle in *General Union of Personnel* and *Amalgamated European Public Service Union*

Under the general principles of labour law, the freedom of trade union activity recognised under Article 24a of the Staff Regulations means not only that officials and servants have the right without hindrance to form associations of their own choosing, but also that these associations are free to do anything lawful to protect the interests of their members as employees.⁴³

Thus, the Staff Regulations were to be interpreted ‘under the general principles of labour law,’ a concept clearly used as a source of law, thus not just a mere point of reference or a source of inspiration. In *Maurissen II* the Court (full as in the two other cases above) first repeated the same principle on forming associations and their freedom of action while not referring at this point to the ‘general principles of labour law’.⁴⁴ In discussing the merits of the case, the Court then traced general principles of labour law by asserting how ‘freedom to engage in trade union activities constitutes a general principle of labour law’.⁴⁵ It was again regarded as a source of law. However, *in casu* it could not ‘be extended so as to require Community institutions and bodies

⁴¹ Case 18/74 *General Union of Personnel of European Organizations (Syndicat Général du Personnel) v Commission of the European Communities* [1974] ECR 933 and its sister case 175/73 *Union syndicale - Amalgamated European Public Service Union - Brussels, Denise Massa and Roswitha Kortner v Council of the European Communities* [1974] ECR 917; joined cases C-193/87 and C-194/87 *Henri Maurissen and European Public Service Union v Court of Auditors of the European Communities (‘Maurissen II’)* [1990] ECR I-95.

⁴² Article 24a of the Staff Regulations provided that ‘Officials shall be entitled to exercise the right of association; they may in particular be members of trade unions or staff associations of European officials’.

⁴³ Paragraph 10 of *General Union of Personnel* and paragraph 14 of *Amalgamated European Public Service Union*. One may wonder why the ILO Convention No. 87 was not mentioned in this context. Whatever the reason was (like the era during which the Court still emphasized the independent nature of Community law), in *General Union of Personnel* ILO Convention No. 87 corroborated the opinion of AG Trabucchi, who found that granting a personnel union the capacity to be a party to proceedings concerning the validity of a decision affecting the union’s members ‘appears also to be in accordance with the spirit and the objects of Convention 87 of the I.L.O. on trade union freedom and the protection of trade union rights’; *General Union of Personnel* [1974] ECR 933 at 948. In the judgment the union was not granted *locus standi*, neither did the Advocate General eventually propose to grant it.

⁴⁴ See paragraph 13 of *Maurissen II*, which referred to *General Union of Personnel* and *Amalgamated European Public Service Union*. While natural as such, the *Maurissen II* did not define ‘anything lawful’ but we may hold that it means in principle anything that has not been prohibited by law.

⁴⁵ Paragraph 21 of *Maurissen II*.

to make their messenger services available to trade unions for the distribution to staff of the communications issued by those organizations' (paragraph 21).

Further, in the *Acton* staff case, concerning non-payment of wages during a strike, the Court held that 'according to a principle recognized in the labour law of the Member States, wages and other benefits pertaining to days on strike are not due to persons who have taken part in that strike. This principle may be applied to relations between the institutions of the Communities and their officials ...'.⁴⁶ The principle of no pay during a strike is universal in market economies, although unwritten in international labour law. However, a 'principle recognized in the labour law of the Member States' was introduced in the field of collective labour law.

In *Dunnett v EIB*⁴⁷ (again a staff case) the Court of First Instance for its part recognized under a 'general principle of employment law' that 'an employer can unilaterally withdraw a financial advantage which he has freely granted to his employees on a continuous basis only after consultation with those employees or their representatives' (paragraph 85). A few passages later this was called (as in the key words on the judgment's front page), based on an expert report, 'a general principle of labour law common to all the Member States' (paragraph 89).⁴⁸ However, this case provides evidence subject to the reservation that the EIB Staff Regulations (Article 44) already referred to the general principles common to the laws of the Member States of the Bank applicable to individual contracts. Relevant 'general principles practice' within individual labour law also occurred in the *X v ECB* case.⁴⁹

One may also see a reflection of general principles of labour law in *Pfeiffer*, where the Court justified the unusual move of the case from a Chamber of five judges to the

⁴⁶ Joined cases 44/74, 46/74 and 49/74, *Acton and others v Commission* [1975] ECR 383, paragraphs 12 and 13. The latter referred to an earlier Commission decision of 16 December 1970, according to which 'it stands to reason that there can be no payment for days on strike'. A curiosity is that the Commission did not deduct pay for three days on strike, and other institutions deducted nothing (paragraph 25). The principle of non-payment during a strike was reconfirmed in the joined cases T-576/93 to 582/93 *Browet and others v Commission* [1994] ECR II-677.

⁴⁷ Case T-192/99 *Dunnett v European Investment Bank* [2001] ECR II-813.

⁴⁸ 'All' is not in the French version. Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases and Materials*, 3rd ed., OUP 2003, p. 372, footnote 4, have called this statement 'a recent unusual example' of inevitable drawing upon principles from the legal orders of the Member States. AG Poiares Maduro in his opinion in case C-384/02 *Criminal proceedings v Knud Grøngaard and Allan Bang* [2005] ECR I-9939, paragraph 56, also elevated social rights relating to the consultation and providing information to workers to the legal order of the Community as general principles of Community law because he considered that they belonged to the constitutional tradition of the Member States, as confirmed by *Dunnett*, paragraphs 89 and 90; see endnote 20 of the opinion in case C-384/02. There was an expert report on national law in *Dunnett* whereas the judgment *Dunnett* itself does not show any expressly constitutional protection. Today it naturally stems from Article 27 of the EU Charter of Fundamental Rights.

⁴⁹ The CFI accepted the employer's connotation of 'general principle of labour law according to which working tools of the employer given to employees at the workplace are to be used for working purposes'; case T-333/99, *X v European Central Bank* [2001] ECR II-3021, paragraph 120. The principle also applied in the absence of any express stipulation; paragraph 122.

Grand Chamber *inter alia* by holding how the Working Time Directive means to protect workers specifically as the *weak party* to an employment contract, meaning protection the ‘useful effect’ (*effet utile*) of which was to be assured both by national and Community jurisdictions.⁵⁰ In another working-time case, *Jaeger*, the Court also assessed rest periods under ‘the need to observe the general principles of protection of the safety and health of workers which constitute the foundation of the Community regime for organisation of working time.’⁵¹

In sum, case-law shows that in the field of collective labour law the unwritten ‘general principles of labour law’ have expressly been used by the Community Courts as a source of EU law. At the same time, it should be stressed that the significance of the ‘general principles of labour law’ is by no means diluted by their being used exclusively in European staff cases. General principles are by definition universal. Besides, their usage by the Court has been deliberate, dealing with core issues of the cases, and has concerned core issues in collective labour law in the staff cases above, covering the basic trade union freedom to do ‘anything lawful’ to protect the interests of the members. Furthermore, it is noteworthy that in *General Union of Personnel*, *Amalgamated European Public Service Union* and *Maurissen II* ‘general principles of labour law’ were not limited to those in the internal law of the Member States as in *Acton* and *Browet*. Although the three first mentioned cases did not explicitly refer to international labour law, it was not excluded either, being covered implicitly.

A natural question arises about the relationship between ‘general principles of labour law’ and the notion of the standard formula regarding fundamental rights, i.e., whether they form an integral part of ‘general principles of Community law’, the observance of which the Court ensures. Were ‘general principles of labour law’ in *General Union of Personnel*, *Amalgamated European Public Service Union* and *Maurissen II* an application of ‘general principles of law’, that notion having been in use by the Court since *Internationale Handelsgesellschaft* 1970 (put as ‘general principles of Community law’ in *Stauder* 1969, as again nowadays)?⁵² It would be *prima facie* attractive to find that ‘general principles of labour law’ were simply a facet of ‘general principles of Community law’ (the observance of which the Court ensures). However, any comment in that sense must first respect the circumstances of and claims and reasoning in these staff cases. Indeed, the cases do not reveal a genuine fundamental rights or ‘general principles of Community law’ discussion but only a general reference by the unions to international treaties as the basis for trade union freedom and an express reference to ILO Convention No. 87 by AG Trabucchi in the *General Union of Personnel* case (see footnote 43, *supra*). Secondly, the Court clearly and actively protected trade union freedom as mentioned by *Maurissen II*:

⁵⁰ Joined cases C-397 to 403/01 *Pfeiffer*, order of the Court of 13 January 2004, paragraph 9; Brian Bercusson reports the order in *Social and Labour Rights under the EU Constitution*, in de Búrca et al. (eds.), *Social Rights in Europe*, OUP 2005, p. 178.

⁵¹ Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] ECR I-8389, paragraph 97.

⁵² Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 4; case 29/69 *Stauder* [1969] ECR 419, paragraph 7. Recent case-law again uses the expression ‘general principle of Community law’ (‘un principe général du droit communautaire’); see, e.g., case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75. On this judgment, see section 1.4.4, *infra*.

14 ...the Community institutions and bodies may not prohibit their officials and servants from joining a trade union or staff association or from participating in trade union activities, or impose any penalty whatsoever on them by reason of such membership or activities...

This protection aspect hints at the notion that trade union freedom under 'general principles of labour law' would fall under 'general principles of Community law', like fundamental rights. On the other hand, 'general principles of labour law' certainly include elements inherent in the individual employment contract where both parties also have rights (like permissive ones) that do not fall under fundamental rights. Thirdly, the basis for the introduction of 'general principles of labour law' was obviously the principle of rule of law in Article 220 EC (as for 'general principles of Community law'). Fourthly, the fact that the Court in *Maurissen II* (in 1990), for example, had the opportunity to enshrine trade union freedom irrevocably under 'general principles of Community law' but did not do so in any case militates against 'general principles of labour law' falling under 'general principles of Community law'. The time was not ripe⁵³ and the decision upon the substance did not impose any stock-taking in that respect. Thus, it looks as if 'general principles of labour law' was (even in *Maurissen II*) a case-related doctrinal extrapolation which however has relevant features of the 'general principles of Community law' doctrine in these cases. Crucially, by resorting to 'general principles of labour law', the Court recognised the status of both written and unwritten labour law as reflected by extra-Community sources (*sensu stricto*), i.e., by the laws and doctrines of the Member States and their international commitments. Even after seventeen years this encourages doctrinal development exercises.

A further clarifying remark on 'general principles of Community law' is appropriate here. Thus, for instance, Tridimas distinguishes those unwritten principles deriving from the rule of law (such as protection for fundamental rights, equality, proportionality, legal certainty and protection of legitimate expectations, and the rights of defence), although as closely intertwined categories, and those 'systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice', such as primacy, direct effect, attribution of competences, subsidiarity and Member States' loyalty.⁵⁴ Here the focus is on the former. As to their status and effect, Tridimas concludes that technically they are not superior to primary Community law (but normally to the secondary one) while they 'have equivalent status with the founding Treaties' since their origin lies in the EC Treaty. He further highlights their role in the interpretation of the Treaties and in judicial review of Community acts.^{55 56}

⁵³ This can be compared to the recent *Cresson* case, briefly explored in section 1.4.4, at footnote 113, *infra*, where the Court obviously took relevant human rights aspects into consideration of its own motion in interpreting the very EC Treaty that includes a *sui generis* regime on the obligations of the Commissioners. Thus, primary EU law was reviewed under human rights requirements. Equally, the old case-law on staff does not prevent the ECJ in *Laval* and *Viking* from confirming that the right to strike is a general principle of Community law, as proposed by the Advocates General; see section 3.3, *infra*.

⁵⁴ Takis Tridimas, *The General Principles of EU Law*, OUP 2006, p. 4.

⁵⁵ *Op. cit.*, pp. 50-55.

Coming back to the staff cases, it is finally noteworthy that in none of them did the Advocates General discuss the general principles of labour law as such. In *General Union of Personnel*, AG Trabucchi, however, summarised the broad historical developments of trade union law:

4. Coming now to trade unionism against its historical background, in order to understand the precise significance of Article 24a of the revised Staff Regulations of Officials, it is important to remember that the pattern of trade union law developed from the situation when, in earlier times, a trade union was regarded as something extra-legal and sometimes illegal as well, until more modern attitudes brought recognition of the value of union activities.⁵⁷

Similarly, the reference by the Advocate General to development and changing attitudes encourages legal reasoning in order to explore and develop further the substance of ‘general principles of labour law’ in an EU law context. In other words, what are those general principles of European labour law that are relevant now, especially in describing the relationship between labour rights and the market freedoms and competition rules? The answer will show that it is already justified to call them *ordre communautaire social*.

1.4 The Substance and Constitutive Elements of *ordre communautaire social*

1.4.1 Overview

The idea of *ordre communautaire social* (OCS) was first introduced by Professor Brian Bercusson in a lecture.⁵⁸ It was later included in the written observations of the Finnish Seamen’s Union (FSU) in *Viking*. Both sources presented it as something ‘[that] may be called’ this. The concept is certainly *mutatis mutandis* borrowed from the French legal-doctrinal tradition where *ordre public social* has meant and means ‘the social minimum’ hammered out by compulsory state norms.⁵⁹ Given the difference in the labour law tradition, there is no viable and equivalent English term for *ordre communautaire social*. Borrowing simply *mutatis mutandis* in this case also means accepting the extra-community and legal-ideological dimensions to be covered by that concept next to the normative ones. I come back to its Community characterization below in chapter III.

Ordre communautaire social must be related in terms of Bercusson to the historical ‘evolution of the EU from a purely economic Community establishing a common market to a European Union with a social policy aimed at protecting workers

⁵⁶ However, see also, for the question of the possible future ‘supra-constitutional’ status of fundamental rights, the perspective opened up by AG Mengozzi See section 3.4, at footnote 308, *infra*.

⁵⁷ Case 18/74 *General Union of Personnel* [1974] ECR 933 at 951, opinion of 10.7.1974.

⁵⁸ EU Law and Right to Industrial Action. Lecture on 15 February 2006 at the Hanken School of Economics, Helsinki, Finland.

⁵⁹ See, e.g., Camerlynck, G. Lyon-Caen and Pelissier, *Droit du travail*, 13th ed., Dalloz 1986, pp. 38-39.

employed in the common market who are also citizens of the Union’. As one manifestation of this evolution, I may refer to the *Deutsche Telekom v. Schröder* case, in which the ECJ stated in 2000 (identically to *Sievers v Deutsche Post*) – obviously of its own motion – how the economic aim of Article 141 EC nowadays has to be considered secondary to its social aim that reflects a fundamental human right.⁶⁰ One also may refer to the *BECTU* case as a similar expression of a paradigmatic evolution in an EU context. There the ECJ had to rule on the right to paid annual leave, which is also an expression of improving workers’ safety and health *sensu lato*. It stated that this improvement should not be ‘subordinated to purely economic considerations’ which repeats the fifth recital of the Preamble to the Working Time Directive (93/104/EC) and with which the ECJ dismissed the UK’s argument that operated with the necessity to avoid imposing excessive constraints on small and medium-sized undertakings, i.e., an economic argument.⁶¹ Hence, both the European judicature and legislator may be the source of such a paradigmatic evolution of labour law.

Thus, on the basis of the historical evolution of EC labour law and international labour law one may tentatively present the five constitutive premises or legal principles⁶² (in the form of the FSU observations⁶³ unless otherwise indicated) of *ordre communautaire social* which partially overlap the *acquis communautaire social*:

- (i) linked to the founding legal principles of the EU as enshrined in Article 6(1) EU (‘liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’), a universal premise of international labour law based on the Constitution of the ILO to which all EU Member States belong: ‘labour is not a commodity’;⁶⁴

⁶⁰ Case C-50/96 *Deutsche Telekom v. Schröder* [2000] ECR I-743, paragraph 57; its identically worded sister case was judgment in joined cases C-270 and 271/97 *Sievers v Deutsche Post* [2000] ECR I-929. As formulated by the national court posing the question for the ECJ, the claim for a retrospective application of the principle of equal pay would risk distortion of competition and have a detrimental economic impact on employers. This is what the ECJ set aside in its evolutionary interpretation of Article 141 EC. On these judgments, see section 2.7, *infra*.

⁶¹ Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 59.

⁶² I use ‘principle’ here in its Dworkinian legal sense, thus as a part of law (and as distinguished from rules) but equipped with variable weight; see Ronald Dworkin, *Taking Rights Seriously*, HUP 1978, pp. 22-30. Dworkin’s distinction between rules and principles is, however, not literally applicable to the distinction between rights and principles in the EU Charter of Fundamental Rights explored in section 1.4.4, *infra*; this distinction is a specific, ‘EU-constitutional’ and *sui generis* issue. For a ‘principle’ as a part of EU law, see, e.g., case 43/75 *Defrenne II* [1976] ECR 455, paragraphs 28 and 29, where the ECJ discussed equal pay as a binding principle, distinguishing it from a vague declaration; the ECJ noted that the term ‘principle’ is specifically used in order to indicate the fundamental nature of certain provisions, as is shown, for example, by the heading of the first part of the Treaty which is devoted to ‘Principles’ (paragraph 28); see section 2.7, *infra*. As to ‘labour is not a commodity’ as a premise, see section 1.4.2, *infra*.

⁶³ The FSU has given its permit for making its observations public.

⁶⁴ The reference here to principles in Article 6(1) EU was presented by the FSU only, not by Professor Bercusson in his lecture. Article 2 of the EU Treaty as (to be) amended by the Reform Treaty will read: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the

- (ii) the activities of the Community include ‘a policy in the social sphere’ (Article 3(1)(j) EC) and the Community and the Member States ‘shall have as their objectives...improved living and working conditions’ (Article 136 EC);
- (iii) respect for fundamental rights of workers reflected in the intra-Community or international legal instruments (ILO, Council of Europe and United Nations);⁶⁵
- (iv) the distinctive characteristic of the European social model which attributes a central role to social dialogue at EU and national levels in the form of social partnership;
- (v) the common market principle of equal treatment of all workers without discrimination based on nationality.

In brief, in the first place the law on free movement in the EU is to be interpreted in the light of *ordre communautaire social*:⁶⁶ as linked to the founding legal principles of the EU, labour is not a commodity like others (goods, capital), free movement and competition rules are subject to the objective of improved working conditions, respecting the intra-Community or international fundamental rights of workers as human beings, acknowledging the central role of social dialogue and social partnership at EU and national levels, and adhering to the strict principle of equal treatment without regard to nationality.

Applied to an industrial action in relation to free movement and competition rules, the OCS approach would mean – *mutatis mutandis* the terms of Bercusson – that collective action is not subject to the EU law on free movement where its exercise involving workers (not a commodity) conflicts with the founding legal principles of the EU, has the intention and/or effect of undercutting working conditions, denies the exercise of fundamental rights by workers and their organisation, undermines the central role of social dialogue and social partnership and/or promotes unequal treatment based on the nationality of the workers.

Later in this article (chapter II), I will test what the OCS approach may mean regarding the actual issues discussed earlier in this study project. Before doing so, it is useful to discuss each of the constitutive elements or principles of *ordre communautaire social*, as enumerated above.

rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ The first sentence corresponds to the present Article 6(1) EU on issues relevant here.

⁶⁵ The difference at this point is that Professor Bercusson did not refer to international sources of fundamental rights other than the European Social Charter.

⁶⁶ Relying essentially on the typology of Bercusson, lecture on 15 February 2006 at Hanken School of Economics, Helsinki, pp. 19-20.

1.4.2 The EU's Founding Legal Principles; 'Labour Is Not a Commodity'

It is not necessary to explore here the founding legal principles of the EU in Article 6(1) EU *in abstracto* at any greater length. Respecting them has been a precondition for EU membership since Amsterdam according to Article 49 EU, and infringements may lead to suspension of Treaty rights (Article 7 EU). Douglas-Scott has noted briefly that Article 6(1) EU is an example of the common basis of values. The statement of the leading legal principles in Article 6(1) EU has more significance because of the simple fact that Europe lacks a *demos* (one nationality as a source of the European legal-political power) whereas there might still be *linking* social, economic and cultural forces and work.⁶⁷ Democracy for its part is normally understood to have its core in political decision-making.⁶⁸ More generally, the Article 6(1) EU principles are of institutionalized value in interpreting and applying Community law. On the other hand (and more elaborating), the principle of equality as a constitutive element of democracy must also mean that there cannot be any formal supremacy of management and owners or market freedoms over labour in law.

Article 6(1) EU nowadays also has a direct impact on secondary EU law. The preambles to the Racial Directive (2000/43/EC; recital 2) and the Employment Framework Directive (2000/78/EC; recital 1) refer not just to the protection of fundamental rights in Article 6(2) EU but also to Article 6(1). The judgment in *Mangold* shows the combined impact of general principles of Community law (of which fundamental rights form an integral part) and the whole of Article 6 EU, over and above Directive 2000/78. The fundamental rights doctrine of the ECJ can be seen as a corollary of the principle of the rule of law.⁶⁹

Essential in this particular context is that the Union is also 'based on the rule of law and the correlative requirements of legal protection'.⁷⁰ Thus the rule of law must

⁶⁷ Sionaidh Douglas-Scott, *Constitutional Law of the European Union*, Longman 2002, p. 195.

⁶⁸ As to the power of democracy, one may refer to case C-70/88 *European Parliament v Council* [1990] ECR I-2041, paragraphs 26-27, where the Court accepted *locus standi* for the Parliament to challenge the acts of other institutions when the prerogatives of the Parliament were infringed. There was at that time no such provision in the EC Treaty so that the decision in fact went beyond the text of the EC Treaty to keep up the inter-institutional balance, i.e., democracy.

⁶⁹ See, e.g., the opinion of Advocate General Stix-Hackl in case C-36/02 *Omega Spielhallen* [2004] ECR I-9609, paragraph 49, and the opinion of Advocate General Mengozzi in case C-354/04P *Gestoras Pro Amnistia* (opinion of 26.10.2006, judgment of 27.2.2007, nyr), paragraph 77. Similarly Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in Alston (ed.), *The EU and Human Rights*, OUP 1999, p. 864, notes the rule of law in Article 220 EC, together with the reference to 'any rule of law' relating to the application of the Treaty in Article 230 EC, as a legal ground for the 'general principles of Community law' doctrine. Judgment in case C-303/05 *Advocaten voor de Wereld* of 3.5.2007, nyr, paragraph 45, presents them as a pair: the Union is founded on the principle of the rule of law (Article 6 EU) and respects fundamental rights as general principles of Community law. See, however, also footnotes 6, *supra*, and 92, *infra* on the doctrine's more factual origin.

⁷⁰ Koen Lenaerts and Piet van Nuffel (ed. Bray), *Constitutional Law of the European Union*, 2nd ed., Sweet & Maxwell 2005, p. 652. The classic case on the role of rule of law in the EU is 294/83 *Les Verts v European Parliament* [1986] ECR 1339, in which the Court accepted that

mean that in deciding on ‘grey area’ cases where the EU law itself does not supply ready-made answers for the legal application, like *Laval* and *Viking*, the reasoning of the judges of the ECJ is bound to take into account all relevant legal sources, in these cases respect for human rights and fundamental freedoms also as referred to in Article 136 EC, enshrined in the EU Charter of Fundamental Rights and guaranteed in international law (see especially sections 4.5 to 4.7 of the second publication).

Let us move on to the premise that ‘labour is not a commodity’, which may be traced back to the ILO Constitution. The Philadelphia Conference of 1944 adopted a Declaration defining the aims of the International Labour Organisation. The Declaration was annexed to the ILO Constitution that is a binding Treaty in 1946. Paragraph I(a) of that Declaration adopted ‘labour is not a commodity’ after an incipit referring to aims, purposes and principles which should inspire the policy of the ILO’s Members. I have called it a (universal) ‘*premise*’ because this maxim is already broader than a mere ‘principle inspiring the policies of the ILO Members’. It has inspired not just state ‘policies’ but also actual legislation, clauses in collective agreements and certainly court decisions, where it may also work as a binding principle (perhaps most often as an unexpressed one) in the Dworkinian sense. It can also be understood as meaning that workers and employees are independent subjects of labour rights that may cross or at least modify their status as subordinated ‘factors of production’. This is its legal-ideological aspect. Furthermore, it can be seen as a specific form of the general and inviolable human dignity that must also be respected and protected according to Article 1 of the EU Charter of Fundamental Rights.

Historically ‘labour is not a commodity’ was introduced with the aim of granting a worker remuneration that would suffice for a decent life for him and his family.⁷¹ Silvana Sciarra has noted how it is “much more than a principle or an aim set out in an international source. It has been powerful enough to inspire other sources and to favour the inclusion in them of the right to fair remuneration for workers, ‘such as will give them and their families a decent standard of living’,⁷² as in Article 4 of the 1961 European Social Charter, echoed later by the 1989 Community Charter.

The premise ‘Labour is not a commodity’ must also be interpreted in its immediate context. In that sense, it is noteworthy that the Philadelphia Declaration also stated how lasting peace can be established only if it was based on *social justice* (paragraph II). It went further by stating that ‘the central aim of national and international policy’ in terms of Valticos and von Potobsky (paragraph II(b)) should be to attain the social

an action for annulment was amenable against measures adopted by the European Parliament (that concerned financing the electoral campaigns) intended to have legal effects vis-à-vis third parties, even though there was no such provision in the Treaty.

⁷¹ Article 427 of the Treaty of Versailles 1919, laying the foundations of the International Labour Organisation, had already proclaimed ‘the guiding principle...that labour should not be regarded merely as a commodity or article of commerce’. On this and other roots of the 1944 formula in the Philadelphia Declaration, see Paul O’Higgins, ‘Labour is not a Commodity’ – an Irish Contribution to International Labour Law, ILJ 1997, Vol. 26, No. 3, pp. 225-234.

⁷² Silvana Sciarra, European Social Rights Policy Convergence, in Alston et al. (eds.), The EU and Human Rights, Oxford University Press 1999, pp. 487-8.

conditions described in the Declaration⁷³ whereby the ‘social conditions’ refer to the principle of social justice. The subsequent passage in the Declaration (paragraph II(c)) then sets out that ‘all national and international policies and measures, in particular those of an economic and financial character, should be judged’ in the light of these social objectives, i.e., social justice.

These principles confirmed the interest of the ILO in economic matters⁷⁴ and are, I maintain, transplantable or valid in the sphere of the EU at an ideological and interpretative level in principle, although the EU’s legal order includes a *sui generis* regime or regimes for the economic freedoms and competition rules, the balancing and reconciliation of which with the prevailing social aims is a unique Community phenomenon or task. Besides, as ILO Member States, the EU Member States are also bound by the principles incorporated into the ILO Constitution to which they all adhered before adhering to the EEC/EU.⁷⁵ Furthermore, the rhetoric on social justice is not completely alien to the EU itself while the second Recital in the Preamble to Single European Act referred to it *expressis verbis* (together with freedom and equality) as a constituent principle of democracy, promotion of which was declared to be a determined and joint task of the Member States.⁷⁶ Another issue (I mean this mainly at the level of principles) is whether this rhetoric has remained lip service only in practice. In any case, promotion of social justice was also enshrined in Article I-3 of the Constitutional Treaty among the objectives of the Union.

Under ‘labour is not a commodity’ (or ‘is not an article of commerce’), the underlying and immediate (although often distant) goal is fair and just working conditions. The EU shares this goal, although not expressly referring to ‘labour is not a commodity’, as Article 31 of the EU Charter of Fundamental Rights shows.⁷⁷ The 1989

⁷³ Nicolas Valticos and Geraldo von Potobsky, *International Labour Law*, 2nd rev. ed., Kluwer 1995, p. 27.

⁷⁴ *Ibid.*

⁷⁵ I also repeat here the moral argument in the second publication (see section 4.6, p. 100) that the EU Member States cannot have rules (and principles, I may say) for themselves different from what they have as ILO Member States within the EU.

The ILO Constitution also has independent significance regarding trade union rights. Thus, in cases where an ILO Member State has not ratified ILO Conventions No. 87 and 98 especially, the Freedom of Association Committee of the Governing Body of the ILO has dealt with complaints on alleged violations of freedom of association on the basis of ‘the fundamental aims and purposes set out in the ILO Constitution’ since its creation in 1951. The Committee has ‘emphasized in this respect that the function of the International Labour Organization in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association’. See Committee report No. 332, case 2227 AFL-CIO and CTM v United States, Vol. LXXXVI, 2003, Series B, No. 3, paragraph 600; <http://www.ilo.org/ilolex/english/casframeE.htm>.

⁷⁶ See Official Journal L169, 29.6.1987. The same Recital also referred to the European Human Rights Convention and the European Social Charter. This ‘social justice’ rhetoric was in a way continued by the Preamble to the Treaty on European Union, the eighth Recital of which referred inter alia to economic and social progress, and to implementing ‘policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.’

⁷⁷ Article 31 of the Charter reads: ‘Fair and just working conditions. 1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest

Community Charter expressed the same principle as to fair remuneration (point 5) and improvement of working conditions (point 7) especially. A specific tie between ‘labour is not a commodity’ and fair and just working conditions is the dignity aspect: workers and employees are independent subjects of social rights, whose dignity is to be protected as to working conditions. If regarding safety, health and working time Article 31 expresses a free-standing fundamental right, its dignity dimension can be seen as a broader maxim having its impact on other social rights guaranteed by the Charter, especially covering the whole spectrum of working conditions insofar as they can affect human dignity; thus remuneration as well, which is not mentioned as such by the Charter.⁷⁸

As to doctrinal writings, this article is certainly not the first one in an EU context resorting to the assumption that labour is not a commodity. Next to the article by O’Higgins⁷⁹ and lecture by Bercusson,⁸⁰ mention has also to be made to Roger Blanpain, Bob Hepple, Silvana Sciarra and Manfred Weiss, who wrote a pamphlet, *Fundamental Social Rights: Proposals for the European Union* in 1996, proposing a revision of the old Article 117 EEC with an eye to the then forthcoming Intergovernmental Conference of Amsterdam by introducing ten fundamental social rights. That structure was preceded by an incipit enshrining the ‘Labour is not a commodity’ principle.⁸¹ The pamphlet was signed by 110 professors of labour law throughout the then 15 Member States.

Finally, one may also take the phrase ‘labour is not a commodity’ as the most prominent one among *general principles of labour law*. It is only to be added that the ILO Constitution is much more than an expression of an attitude that first changed the legal-political ‘landscape’.⁸² It is the highest possible recognition of the values concerned and at the same time an international treaty-based obligation of every EU Member State as a Member of the ILO, which obligation they have also reiterated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.⁸³ Since the

periods and to an annual period of paid leave.’ Article 1 of the Charter declares that ‘[h]uman dignity is inviolable. It must be respected and protected.’ Since according to the Convention’s explanation it is a part of the substance of the rights laid down in the Charter, it must be respected, even where a right is restricted.

⁷⁸ This broad notion of dignity is advocated by Thomas Blanke, Fair and just working conditions, in Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos 2006, pp. 375-377.

⁷⁹ See footnote 71, *supra*.

⁸⁰ See footnote 58, *supra*.

⁸¹ Roger Blanpain, Bob Hepple, Silvana Sciarra and Manfred Weiss, *Fundamental Social Rights: Proposals for the European Union* (1996).

⁸² Cf. the position of De Vos (mentioned in another context in the third publication, section 1.3.2.1) that ‘labour is not a commodity’ is of ‘clear Marxist phraseology that diametrically opposes the neo-liberal approach of labour relations’.

⁸³ Paul O’Higgins rhetorically asks, given that all the EU Member States have also committed themselves to the principles of the 1998 ILO Declaration as ILO Member States, ‘what obstacles should there be to the Court giving effect to these principles as part of the law of the European Communities?’ He sees no obstacle. See Paul O’Higgins, *The interaction of the ILO, the Council of Europe and European Union labour standards*, in Hepple (ed.), *Social and Labour Rights in a Global Context*, Cambridge University Press 2002, p. 63. O’Higgins does not, however, discuss Article 307, first paragraph, EC and general international law, which

EU promotes and rewards the realization of basic labour rights covered by the Declaration in its trade agreements with third countries (under Regulation 980/05/EC), it is only natural that its paradigmatic impact is recognized by the EU. *General principles of labour law* as a connotation recognized by the ECJ also link it to EU law (see section 1.3, *supra*).

1.4.3 EU's Social Policy and Upward Harmonisation

Article 3(1)(j) EC, enshrined by the Treaty of Maastricht, refers to 'policy in the social sphere' which is in itself a programmatic declaration. However, it is reasonable to read this 'social policy', *first*, in the light of 'a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women ... the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States', as Article 2 EC counts the tasks of the EU. Reading Article 3(1)(j) EC in conjunction with Article 2 EC is also the lesson from the *Albany* judgment.⁸⁴

Second, the concept of 'social policy' is of course to be read in the light of the principal social policy provision, i.e., Article 136 EC. This provision has somewhat developed the already pivotal assertion of the original Article 117 EEC, in which the Member States agreed 'upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.' The amendment by the Amsterdam Treaty highlighted the new Community nature of the proviso; it now highlights how the Community and the Member States 'shall have as their objectives...improved...working conditions', making upward harmonisation possible. Article 117 EEC, second paragraph, mentioned as the source of upward harmonisation a 'common market credo'⁸⁵ (as well 'procedures provided for in this Treaty' and the approximation of laws) and Article 136 EC, third subparagraph, still repeats this.

In *Defrenne III*, the ECJ had already confirmed that Article 117 EEC was essentially programmatic.⁸⁶ In *Zaera*, the ECJ added: 'The fact that the objectives of social policy laid down in Article 117 are in the nature of a programme does not mean that they are deprived of any legal effect. They constitute an important aid, in particular for the interpretation of other provisions of the Treaty and of secondary Community

impose such an effect. He still finds that 'labour is not commodity' is a legally binding principle.

⁸⁴ See case C-67/96 *Albany International* [1999] ECR I-5751, paragraph 54, which referred to Article 2 EC as it stood after the Treaty of Maastricht.

⁸⁵ Article 117 EEC read *inter alia*: '...such a development will ensue ... from the functioning of the common market...'. This 'common market credo' is still enshrined in Article 136 EC, third subparagraph. Accordingly, the bounds to economic conditions are highlighted by the reference to 'the need to maintain the competitiveness of the Community economy' in the second subparagraph of Article 136 EC. So far this new condition has not been reflected in actual secondary legislation or cases. Another aspect is that its presence may reflect the legislator's general disinclination for new legislative initiatives.

⁸⁶ Case 149/77 *Defrenne III* [1978] ECR 1365, paragraph 19.

legislation in the social field.⁸⁷ Accordingly, Article 117 EEC was mentioned in the preambles to the directives on collective redundancy (75/129/EEC), transfer of undertakings (acquired rights; 77/187/EEC), employer insolvency (80/987/EEC) and information on working conditions (91/533/EEC).

Given this history, Article 136 EC is equally programmatic and mainly takes a bottom line effect in terms of principles and interpretation. While it draws the fundamental rights referred to (thus those in the 1989 Community Charter and in the European Social Charter) into EU law, it is not a valid legal basis for secondary legislation like Article 137 EC. However, the present wording of Article 136 EC reflects a new emphasis given to a *Community social policy* with improvement of working conditions and upward harmonisation as one of its leading principles.⁸⁸ Accordingly, Article 136 EC is of importance in interpreting other provisions of the EC Treaty, such as those on free movement and competition or Article 137 EC.⁸⁹ Finally, the EU's social policy is a real entity as the breakdown of secondary legislation in section 1.2 above shows.

As a real test of improving working conditions, one has to mention the draft Directive on Temporary Work.⁹⁰ Its legal basis is Article 137(2) EC and hence 'working conditions', which is covered by Article 137(1)(b). The Directive would in general terms require paying temporary workers the wages applicable in the case of a direct employment relationship with the user undertaking. Derogations would be possible in case of a permanent contract with the temporary agency (who continues to pay wages between the postings), by way of collective agreements and in the case of postings shorter than six weeks. This would raise the wages of agency workers in many Member States, particularly the UK. The Directive would not prejudice the Posted Workers Directive 96/71/EC. It has, however, been blocked in the Council of Ministers since summer 2003.

A much more controversial approach appears in the recent Green Paper of the Commission on 'Modernising labour law to meet the challenges of the 21st century', which highlights the growing importance of atypical employment relationships as a reflection of the overly rigid regulation of the standard employment contracts and advocates 'flexicurity' (a combination of flexibility and security) as the overall remedy. Thus, one of its (rather rare) concrete references is the assumption that '[r]ecourse to alternative forms of employment could further increase in the absence of moves to adapt the standard employment contract to facilitate greater flexibility to both workers and enterprises alike.' As a remedy, the Paper refers to deterioration of protection in standard employment contracts, although hidden under an 'alteration where necessary'; 'accordingly, the [European Employment] Task Force urged Member States to assess, and where necessary alter, the level of flexibility provided in standard contracts in areas such as periods of notice, costs and procedures for

⁸⁷ Case 126/86 *Zaera* [1987] ECR I-3696, paragraph 14.

⁸⁸ I recall that, as I have shown in my first publication, section I.2.1, upward harmonization has also been subject to lip service long since, for example, in the sense that the Collective Redundancy Directive, contrary to the promise in the Preamble, finally does not harmonize the redundancy payments, nor fixes any minimum amount for them.

⁸⁹ See, e.g., case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 55.

⁹⁰ See Communications of the Commission (2002) 149 final and (2002) 701 final.

individual or collective dismissal, or the definition of unfair dismissal.⁹¹ The obvious tendency to degrade the conditions in standard contracts is not in conformity with the principle of upwards harmonisation and improved working conditions. Enhanced protection in atypical contracts would be a measure in that direction.

1.4.4 Respect for Fundamental Rights

General Aspects

It is possible to present only the main lines of the status of fundamental rights in the EU here, i.e., those necessary for the formulation and understanding of their status as a part of *ordre communautaire social*. Thus, fundamental rights nowadays have a natural place in any thorough description of EU labour law and are equally indispensable in an '*ordre communautaire social* way of thinking'. Whereas the Community does not have proper written collective labour law (unless on information and consultation of employees, and on social dialogue) fundamental rights as expressed in various charters and treaties have a more salient impact on collective labour law than on individual employment law. Freedom of association and the right to collective bargaining and action are the core rights, variably but generally taken, already deeply rooted in international and EU human rights instruments (see sections 4.4 to 4.7 of the second publication and section 2.5, *infra*, on the right to collective action). The international instruments include above all the ILO Constitution and Conventions No. 87 on the Freedom of Association and Protection of the Right to Organise and No. 98 on the Right to Organise and Collective Bargaining, as reiterated by the 1998 Declaration of Fundamental Rights and Principles at Work. All the EU Member States have also ratified either the original European Social Charter of 1961 or the 1996 Revised Social Charter with just a few relevant reservations on the essential labour rights. In December 2000, the European Council, Parliament and Commission solemnly proclaimed the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p.1; 'the EU Charter'), which includes *inter alia* the abovementioned basic labour rights.

As fundamental rights sources referred to by the same EC Treaty, Article 136 EC, the Community Charter of Fundamental Social Rights of Workers of 1989 and the European Social Charter (ESC) merit some remarks additional to what I wrote in the second publication.⁹² The main point was that the reference to them in Article 136 EC makes them a part of EC law and forms when the references are taken seriously, in principle a guarantee for such things as the right to collective action in EC law. However, I note that both these Charters have also already shown their interpretative

⁹¹ Green Paper on Modernising labour law to meet the challenges of the 21st century, COM(2006) 708 final, p. 3. The report referred to was 'Jobs, Jobs, Jobs; Creating more employment in Europe. Report of the Employment Taskforce', European Commission November 2003, p. 30. The Green Paper does not deal with collective labour law.

⁹² See sections 4.4.4 and 4.4.6 of the second publication. The 'mode of emergence' of the ECJ's fundamental rights doctrine is worth noting; thus, it once was a response of the ECJ to the reservations of the German and Italian constitutional courts especially regarding the direct effect and primacy of EC law (see footnote 6, *supra*); see, e.g., J.H.H. Weiler, *The Constitution of Europe*, CUP 1999, p. 108, and Tuomas Ojanen, *The European Way*, Gummerus 1998, p. 106.

value: the ECJ has used the ESC as a real argument already in the early *Defrenne III* and *Blaizot* cases, as well as recently in *Kiiski*.⁹³ The Community Charter was referred to via the Preamble to the Working Time Directive, at least in the *United Kingdom v. Council*, *BECTU*, *Jaeger*, *Pfeiffer* and *Dellas* cases,⁹⁴ whereas this year we see a subtle but genuine modification. In *Chacón Navas* the Court (Grand Chamber) presented the 1989 Community Charter under the heading of Community law and did so not via the Preamble to the Employment Framework Directive 2000/78 (the object of the litigation) that refers to the Charter (sixth Recital), the Court introducing the Charter via Article 136 EC.⁹⁵ Furthermore, Articles 13 and 137 EC were to be read in conjunction with Article 136 EC when defining the Community competence (paragraph 55). This might imply that the Charters, since referred to by Article 136, also have an impact in discussing the Community competence in light of Article 137(5) in the view of the Court, thus towards accepting the author's argument that Article 137(5) does not exclude collective labour rights from the Community competence (see section 4.3 of the second publication). Recently in the working time case *Commission v United Kingdom*, the Court (the Third Chamber) added the qualification that the Community Charter was 'adopted at the meeting of the European Council' and 'mentioned in Article 136 EC' to the traditional 'Charter formula' (of cases *United Kingdom v Council* etc.).⁹⁶ These are again small but real steps.

To base further reasoning on the relationship between the fundamental rights and the economic market freedoms, I repeat in brief some basics of the fundamental or human rights developments in the EU. Fundamental rights are nowadays subject to the following settled legal formula in EU law following the voluminous case-law since *Stauder*:⁹⁷ 'Fundamental rights form an integral part of the general principles of Community law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member

⁹³ Case 149/77 *Defrenne III* [1978] ECR 1365, paragraph 28; case 24/86 *Blaizot* [1988] ECR 379, paragraph 17; case C-116/06 *Kiiski*, judgment of 20.9.2007, nyr., paragraph 48. Advocates General have resorted to the ESC in some ten cases. A certain sensitivity in respecting the obligations (on family reunification) arising from the European Social Charter is reflected by case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 107, although the Charter was not at the heart of the litigation but annulment of a Council Directive that recognized the better protection by the ESC regarding the Member States that have ratified the ESC provisions concerned.

⁹⁴ Case C-84/94 *United Kingdom v. Council* [1996] ECR I-5755, paragraph 76; case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 39; case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 47; case C-397/01 *Pfeiffer* [2004] ECR I-8835, paragraph 91; case C-14/04 *Dellas* [2005] ECR I-10253, paragraph 40.

⁹⁵ Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 11. A further qualification by the Court was that the Charter was 'adopted at the meeting of the European Council'. The difference is clear in comparison to what AG Jacobs asserted in *Albany*. He wrote (in paragraph 137 of the opinion): 'However, the Charter has very limited legal effects. It is not a legal act of the Community but a solemn political declaration adopted by Heads of State or Government of 11 of the then 12 Member States, and it has not been published in the Official Journal. In the Agreement on social policy attached to the Treaty on European Union the same 11 Member States which adopted the Charter were not willing to confer legal effect on the rights to which they had given their political support in the Charter.'

⁹⁶ Case C-484/04 *Commission v United Kingdom* [2006] ECR I-7471, paragraph 35.

⁹⁷ Case 29/69 *Stauder* [1969] ECR 419.

States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights has special significance in that respect'.⁹⁸ The *Roquette Frères* judgment (paragraph 29) also shows how the ECJ modifies its case-law according to the developments of the case-law of the European Human Rights Court (hereinafter also 'ECrTHR'), as is appropriate. Furthermore, Article 6(2) EU enshrines the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also 'ECHR') as a source and parameter of EC law. The Treaty of Amsterdam gave the Court jurisdiction to ensure that Article 6(2) EU is observed by the EU institutions (Article 46(d) EU). The Reform Treaty proclaims respect for fundamental rights and will require the EU to accede to the ECHR.

Schmidberger

Despite the magnificent progress driven by the ECJ originally as a reflection of the human rights concerns, certainly in Germany and Italy (see footnotes 6 and 92, *supra*), the relationship between fundamental rights and the economic market freedoms is still evolving (if it ever reaches maturity). Even the methodology in *Schmidberger* can be criticized from a fundamental rights angle, while the Court preliminarily discussed the *in casu* existence of a restriction on free movement of goods (paragraphs 51 to 64) at length, presenting fundamental rights essentially as a justification for restriction of a market freedom.⁹⁹ On the other hand, the judgment confirms the principle that infringements of fundamental rights 'are not acceptable in the Community' (paragraph 73). Thus, the decision on that relationship in this judgment was based on a balance between the fundamental right and free movement of goods, where the former was 'relied upon as justification for a restriction of the latter' (paragraph 77).

⁹⁸ See, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Opinion 2/94 [1996] ECR I-1759, paragraph 33; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71; Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 33; Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, paragraph 35.

⁹⁹ For the critics on this line ('in judgment too much or even misplaced emphasis on the market values'), see, e.g., John Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union: Schmidberger and Omega in the Light of the European Constitution*, *European Law Journal* Vol. 12, No. 1, January 2006, pp. 15–40, at 39–40. The point of reference for Morijn is the opinion of Advocate General Stix-Hackl in the *Omega* case (previous footnote), paragraph 53, where she finds that the weighing up of common market freedoms against fundamental rights as such reflects the negotiable nature of fundamental rights, whereas the proper approach would be to protect market values only in so far as (inherent) 'openings' in the fundamental rights themselves allow. Tuomas Ojanen on the same line also writes in his case annotation (in Finnish) on *Schmidberger* in *Lakimies* 1/2004, p. 134, emphasizing that the question about the 'basic principle' or the Habermasian 'legal paradigm' is not just a question of principle or otherwise non-significant. The paradigm finally decides in hard cases where a reconciliation of market freedoms and fundamental rights is absolutely impossible. For Ojanen, *Schmidberger* shows how the EU's 'legal paradigm' still is based on market freedoms rather than fundamental rights. However, he finds that *Schmidberger* in the end was not such a 'hard case', necessitating profound reasoning on the relationship between fundamental rights and market freedoms. The author agrees. *Laval* and *Viking* arguably are such hard cases.

The Court was also faced in any case with the question of the market freedom interfering with the fundamental right, which had to happen only in the general interest, be based on a pressing need in a democratic society and be both proportionate and acceptable and not impair the substance of the right guaranteed (paragraphs 79 and 80). Thus, the starting-point was not the possibly unacceptable interference with the fundamental freedoms of expression and assembly. In any case, the contents in *Schmidberger* genuinely also dealt with the protection of fundamental rights (paragraphs 79 and 80) and de facto led to their precedence *in casu* under the ‘wide margin of discretion’ of the national authorities; paragraphs 81 and 82. In the second publication (fourth chapter) I have asserted that this type of protection is transferable to the protection of pure labour rights, in this case the right to collective action as combined with the principle of protection of workers. I also note how that principle has worked as the yardstick of the proportionality assessment in justifying restrictions on the freedom to provide services. It is logical to foresee that it is also a relevant yardstick in assessing the narrow restrictions possible on fundamental labour rights. This combination of a fundamental right and protection of workers normally works out as a protection anchored in the commitments of all the Member States given within the ILO, in the Community Charters, the European Social Charter, the ECHR and the constitutional traditions.

If *Schmidberger* reflects a market-bound approach on fundamental rights, however also bolstered by their genuine protection, in any case it simultaneously witnesses the growing importance of fundamental or human rights in the EU legal order and demonstrates their ability to (at least) delimit the fundamental market freedoms. Indeed, at least among human rights scholars, the fundamental rights developments have perhaps enabled fundamental rights to become no less than a new foundation for the EU’s legal order. Douglas-Scott explains this by remarking that direct effect and supremacy once were the original foundations for a community that had the common market as its vision. ‘However, with the common market now largely achieved, fundamental rights could take its place as the foundation, especially at a time when the EU draft Constitution seems to have been abandoned, or at the very least adjourned.’¹⁰⁰ This prospect is highly evolutionary (if not in a way quasi-

¹⁰⁰ Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, CMLRev. 43, 2006, p. 661. The point of reference for Douglas-Scott was Armin von Bogdandy’s article ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’, CMLRev. 37: 1307–1338, 2000. Von Bogdandy discussed the issue of a ‘New Foundation for the Legal Order?’; *ibid.*, p. 1333 et seq. In his conclusions, written when the first Convention had just drafted the Charter of Fundamental Rights of the EU, however, he more modestly asserted that ‘[h]uman rights, though important, should not be understood as the *raison d’être* of the Union’; *ibid.*, p. 1338. On the other hand, von Bogdandy noted how this (‘main’) *raison d’être* was what ‘les sages’, Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson, had proposed under the heading ‘Leading by Example: A Human Rights Agenda For the European Union for the Year 2000’, in Alston et al. (eds.), *the EU and Human Rights*, OUP 1999, p. 926. In case C-354/04P *Gestoras Pro Amnistía*, judgment of 27.2.2007, nyr, Advocate General Mengozzi described the pivotal role of fundamental rights (as linked to the rule of law), as follows: ‘Respect for human rights and fundamental freedoms and the principle of the rule of law are therefore an ‘internal’ dimension, being a foundation of the Union and a criterion for assessing the legality of the action of its institutions and of the Member States in the matters for which the Union has jurisdiction, and an ‘external’ dimension, as a value to be ‘exported’

revolutionary), while only time will finally show its validity. The author also suggests that the developments will obviously be less straightforward than supposed in Douglas-Scott's view, which was itself conditional. In any case the constitutionalisation process of fundamental rights has also produced the EU Charter of Fundamental Rights (so far; I comment on the Reform Treaty of 2007 below in section 3.4) as the highest embodiment of the common values of the Member States with several social and labour rights included and, besides, on an equal footing with the civil and political as well as economic rights.¹⁰¹ Among the market freedoms, freedom of establishment and provision of services as well as the right to conduct a business are mentioned by the Charter (Articles 15 and 16), while free movement of goods and capital are not included in the Articles. On the other hand, the third paragraph of the Preamble to the Charter states how the Union ensures free movement of persons, goods, services and capital, and the freedom of establishment. It thus reassures the fundamental nature of market freedoms.

Mangold

As an example of the growing impetus of fundamental rights, one has also to mention the recent *Mangold* judgment in which the Court (the Grand Chamber) recognised that the prohibition of discrimination on grounds of age is a general principle of Community law as a specific form of equality. Thus, the judgment did not spell out that protection against age-discrimination is also a fundamental right, but the context justifies assuming that the outcome implies this, as becomes clear below. The recognition of a general principle of Community law was expressed independently from the Employment Framework Directive 2000/78, which is intended to implement the prohibition against discrimination on the grounds of age. The ECJ identified the source of the prohibition being found in various international human rights instruments (also referred to by the Preamble to the Directive, starting from the Article 6(1) EU principles and even covering the Universal Declaration of Human Rights) and in the tasks set out in the Employment Guidelines adopted by the Council in 1999.¹⁰² In contrast to *Mangold*, once in *Defrenne III* (1978) Article 141 (ex 119)

beyond the borders of the Union by means of persuasion, incentives and negotiation' (paragraph 79).

¹⁰¹ Brian Bercusson, Stefan Clauwaert and Isabelle Schömann, Legal prospects and legal effects of the EU Charter, in Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos 2006, p. 78. The book includes an extensive discussion of trade union rights included in the Charter. That the Charter puts fundamental social rights on an equal footing with economic ones is also the position of Miguel Poiates Maduro, *The Double Constitutional Life of the Charter*, in Hervey and Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart Publishing 2003, p. 286. The Preamble to the Charter (third paragraph) states that the Union ensures free movement of persons, goods, services and capital, and the freedom of establishment. Article 15 of the Charter recognizes the right of establishment and to provide services in any Member State and Article 16 correspondingly the right to conduct a business. In settled case-law, the ECJ has recognized that the right to property and to carry on a business are general principles of EU law, subject however to proportionate and tolerable restrictions that correspond to objectives of general interest and do not impair the substance of the rights guaranteed (see, e.g., joined cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd* [2005] ECR I-10423, paragraph 87).

¹⁰² Case C-144/04 *Mangold v. Helm*, [2005] ECR I-9981 paragraphs 74 and 75. The case also merits a couple of comments outside the 'general principle' issue. The proceedings at issue

the EC was incapable of quashing an age-limit of 40 for an air hostess.¹⁰³ It is also noteworthy that a strict treatment of the reference questions did not necessarily require a position to be taken on a possible general principle of Community law. In so doing the Court acted in its special role as the guardian of general principles of Community law. Thus, the decision in *Mangold* has been described as '[a]dding a new chapter to the judicial constitution of the European Union', and '[t]he relevance of this constitutional turn in *Mangold* cannot be underestimated'.¹⁰⁴ A relevant detail is still that in substance the Court accepted objective and reasonable difference in treatment for the purpose of promoting the integration into working life of older unemployed persons. However, employment promotion in the (unexpressed) terms of 'flexicurity' via fixed-term contracts weighed less in the judgment than prohibition of age discrimination as a general principle of Community law.

A logical consequence of regarding the prohibition of discrimination on the grounds of age a general principle of Community law was that it was to be observed irrespective of the time limit in the implementation of the Employment Framework Directive, the national court furthermore being obliged to guarantee the full effect of the Community principle in a dispute between private parties and thus setting aside any conflicting national rule.¹⁰⁵ A general principle of Community law (that includes

concerned a single fixed-term contract. In paragraphs 41 to 43 the Court, guided by the clause 5(1) of the Fixed-term Agreement that refers to prevention of abuse by successive agreements seems to assume that a single fixed-term agreement would not require any justification. This is the interpretation on the judgment of Loredana Zappala, Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ's Jurisprudence, ILJ Vol. 35, No. 4, December 2006, p. 440. However, it is possible to read *Mangold* as not being a final position on the justification of a single agreement, but only on the effect of Clause 5(1) of the Agreement in this case. This would be in line with the protection granted against discrimination regarding single agreements for older workers (paragraph 64). However, Bercusson and Bruun have also held that a single fixed-term contract requires justification by virtue of paragraph 7 of the General Considerations of the Fixed-Term Agreement. This refers to the *use* of fixed-term contracts based on objective reasons as a way to combat abuse. See Bercusson and Bruun, The Agreement of Fixed-Term Work - A First Analysis, in Vigneau et al., Fixed-term work in the EU, National Institute for Working Life, Stockholm 1999, pp. 81-82.

¹⁰³ Case 149/77 *Defrenne (III) v Sabena* [1978] ECR 1365, paragraphs 20-23. The plea was that the age limit had pecuniary consequences for Ms. Defrenne in her working relationship. The Court found that the matter fell under Articles 117 and 118 EEC that offered no remedy.

¹⁰⁴ See Dagmar Schiek, The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation, ILJ Vol. 35, No. 3, September 2006, p. 333 and 335 respectively.

¹⁰⁵ See paragraphs 77 and 78 of the judgment; reference was naturally made to Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30. Judgment *Mangold* itself does not discuss any conditions for the horizontal direct effect (like a sufficiently clear and unconditioned right) but takes it for granted in this case. Horizontal direct effect as such regarding a general principle of Community law had already been confirmed in case 43/75 *Defrenne II*. On that judgment, see the first publication, section 2.2, the third publication, section 1.2.4, and section 2.7, *infra*. See also Andrew Clapham, Human Rights in the Private Sphere, pp. 250-255. One of his conclusions is that the ECtHR has not shown federalism similar to that of the ECJ in *Defrenne II* which, according to Clapham, is the key to understanding the difficulties surrounding the extension of the ECHR into the private sphere, p. 256. For recent labour law cases from the ECtHR showing the state responsibility system under the ECHR, see, e.g., *Sørensen v. Denmark* and *Rasmussen v. Denmark*, applications Nos. 52562/99 and 52620/99, judgments of 11 January

a fundamental right) can have also a horizontal direct effect, as the *Mangold* case itself shows, involving a dispute between a practising lawyer (Rechtsanwalt) and his lawyer employee, although this is not a general attribute of Community human rights.

The outcome in *Mangold* (a general principle of Community law with horizontal direct effect) has also provoked constitutional criticism; editorial comments in the first *Common Market Law Review* following the judgment suggested that it meant interpreting Article 13 EC *contra legem* by introducing the horizontal direct effect as linked to the general principle of law and, regarding the direct effect of directives, rendered ‘the task of providing a coherent account of this area of Community law more daunting than ever’.¹⁰⁶ This criticism is not convincing because of the bold underestimation of the human rights values and obligations (that the comments call ‘vague’), connected to Article 6 EU, the recognised effect of international law in the Community¹⁰⁷ and the principle of equality. The point of the criticism relies on an intra-Community aspect, although constitutional, while the principle of equality simply stems from higher (essentially international) human rights values. Furthermore, the judgment did not establish the horizontal direct effect of directives.

Writing recently, but prior to *Mangold*, Clapham has asserted in general terms that non-discrimination provisions in the EC Treaty may be enforced against private individuals as part of Community law, basing his view on *Walrave*, *Defrenne II* and *Angonese* and even the British High Court judgment in *Viking v. International*

2006. Article 11 ECHR (after voting) outlawed a pre-entry closed shop and it was the state that had to pay 2,000€ damages to Mr. Sørensen.

¹⁰⁶ Editorial Comments: Horizontal direct effect -A law of diminishing coherence? *Common Market Law Review* 43, 2006 p. 8. A.A., writes in a similar vein in Editorial comment ‘Out with the old...’, (2006) 31 E.L.Rev. [1-2], insisting that the judgment impliedly meant to introduce the horizontal direct effect both of Article 13 EC and a directive encapsulating a general principle of law. In fact, the judgment did neither. Advocate General Mazák has levelled similar constitutional criticism in case C-411/05 *Palacios de la Villa*, opinion of 15.2.2007, especially in paragraphs 87 to 97 and 105 to 138, where the last paragraph refers inter alia to unacceptable undermining in *Mangold* of the ‘no horizontal direct effect of directives’ maxim by recourse to a general principle of Community law. The opinion also includes a reference to the variety of general principles in Community law (paragraphs 134-5), with reference to the analysis of fundamental rights as general principles of Community law of Advocate General Stix-Hackl in case C-36/02 *Omega* [2004] ECR I-9609, paragraphs 48 to 66). In case C-227/04P *Lindorfer*, Advocate General Sharpston did not call *Mangold* into question as such, considering it better to read it as implying that the general principle of equality has always included the prohibition of age discrimination, whereas Directive 2000/78 introduced a specific, detailed framework for dealing with this (and certain other forms of) discrimination (paragraph 58 of the opinion in *Lindorfer* of 30.11.2006). The ECJ in its judgment in *Lindorfer* (of 11.9.2007) did not, however, refer to *Mangold*. In its judgment of 16.10.2007 in *Palacios de la Villa*, the ECJ did not discuss age discrimination as a general principle of EU law but accepted compulsory retirement ages on the basis of Directive 2000/78 ‘where the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market’, and ‘it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose.’

¹⁰⁷ See cases C-286/90 *Poulsen* [1992] ECR I-6019, paragraph 9, and C-162/96 *Racke* [1998] I-3655, paragraph 45, and section 4.6 of the second publication.

Transport Workers' Federation and Finnish Seamen's Union (that the Court of Appeal later referred to the ECJ).¹⁰⁸ However, in the case last mentioned, the British lower court indeed established direct discrimination (and direct effect of Article 43 EC) and therefore issued an injunction against the right to strike, whereas the Court of Appeal set this judgment aside. Taken generally, *Mangold* certainly adds to the strength of Clapham's argument, although it does not guarantee that any general principle of Community law including a fundamental right entails horizontal direct effect. In the case of age discrimination, the effect is of course inherent, otherwise the whole normative framework must be taken into account, not just the presumption that the norm concerned expresses a clear and unconditional rule.

Hence, *Mangold* referred to international human rights instruments and the constitutional traditions of the Member States (paragraph 74) as a basis for the 'general principle of Community law' assertion in general terms, but also presented it as a reflection of the general principle of equality (paragraph 76). Had the case been decided after judgment in case C-540/03 *Parliament v Council* (discussed below), we would also have probably seen an express reference to the prohibition of age discrimination in Article 21 of the EU Charter. However, it is certainly arguable that the other forms of discrimination covered by Article 13 EC Charter (thus concerning sex, racial or ethnic origin, religion or belief, disability and sexual orientation) would not receive treatment different from *Mangold* in a future case (as, in fact, *Defrenne II* has already shown regarding pay equality). Age discrimination is equated in principle to a longer list of prohibited discrimination in Article 21 of the EU Charter (including colour, genetic features, language, political or any other opinion, membership of a national minority, property and birth) which forms a further natural field where we may expect extensions of *Mangold*. In any case, the judgment shows that prohibition of age discrimination also implies a fundamental right against such discrimination. The decision is, no doubt, of constitutional relevance in defining general principles of Community law, reflecting (in judicial law-making de facto) the combined effect of the international human rights instruments (although they do not expressly proclaim the prohibition of age discrimination, unless in Article 21 of the EU Charter), the founding legal principles of the Union (Article 6(1) EU) and the constitutional traditions of the Member States, this last aspect being not explored in any detail.

What then is the impact of *Mangold*, for labour rights, i.e., those enshrined in the 'Solidarity' Chapter of the EU Charter after all? I mean especially the right to collective bargaining and action in Article 28. The editorial comments in the Common Market Law Review refer to the Solidarity Chapter rights (calling them 'social aspirations' and the Chapter a 'fertile source of such speculative claims') in the hands of 'ingenious' counsel,¹⁰⁹ subject to invoking such things as the right to collective action as a general principle of Community law with the horizontal direct effect à la *Mangold*. The first half of the force of the editorial comments is eliminated by the fact that the comments themselves recognise how the *Mangold* solution could have been adopted in *Marshall*¹¹⁰ and other gender equality cases. The second half clashes with

¹⁰⁸ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OUP 2006, pp. 190-192 and note 115. On *Viking v. International Transport Workers' Federation and Finnish Seamen's Union* see also sections 2.5 and 3.3, *infra*.

¹⁰⁹ Editorial comments of CMLR, footnote 106, *supra*, p. 8.

¹¹⁰ Case 152/84, *Marshall* [1986] ECR 723.

the fact that general principles of Community law (including fundamental rights) do not come out of thin air and especially in this case are not merely ‘social aspirations’. They are expressly formulated as a ‘right’ in the case of the right to collective bargaining and action that also stems from well-established international law instruments like the ILO Constitution and Conventions 87 and 98, with their monitoring practice *in minutiae* spanning the decades. Besides, as shown in the second publication, by virtue of Article 307 EC, first paragraph, the EC Treaty does not affect such prior obligations of the Member States and for the rest settled case-law recognises the effect of general international law in EU law, international labour law agreements included.¹¹¹ Taking the EU Charter rights seriously – certainly after *Parliament v. Council* of 27.6.2006 – is in line with this (as is the European Social Charter, also referred to in Article 136 EC), and indeed it would be no surprise to see Article 28 of the Charter as provided with a horizontal direct effect à la *Mangold*.¹¹² Another aspect is that such an effect also stems directly from the international sources. Furthermore, it would be wholly unbalanced to grant freedom to provide services (or, alternatively, freedom of establishment) horizontal direct effect in *Laval* and *Viking* but not to attribute it to the right to collective action as a general principle of EC law.

In sum, *Mangold*, by building upon international human rights instruments and Article 6 EU, accomplishes the argument based on Article 307 EC, first paragraph, and general international law. By reinforcing the status of fundamental rights in employment law, *Mangold* also contributes to the edifice of *ordre communautaire social*.

Cresson

There are also other recent reflections of the rising status of fundamental rights. In the third publication (at footnote 108) I have asserted that the recent *Cresson* judgment¹¹³ reflects the modern universalism of human or fundamental rights in comparison to *Grogan*, for instance, where the Court was able to cover abortion by the freedom to provide services in 1991 but was unable to protect freedom of expression (i.e., providing information and speaking of abortion abroad), which fell outside

¹¹¹ See footnote 12, *supra*, and the remarks in sections 4.5 to 4.7 of the second publication and section 2.5, at footnotes 201 to 213, *infra*.

¹¹² Krebber, The Social Rights Approach of the European Court of Justice to Enforce European Employment Law, *Comparative Labor Law & Policy Journal* Vol. 27:2006, pp. 402-3, taking the effect of *Mangold* on the Solidarity Chapter rights seriously, has in any case held that a corresponding direct effect of these social rights would require existing (secondary) European legislation, as in the ‘*Defrenne II* and *Mangold* mechanism’. The author cannot accept this position. In *Defrenne II*, the Equal Pay Directive 75/117 was fully auxiliary and simply not capable of depriving Article 119 EEC of its direct effect (specifically paragraphs 60 and 67). Accordingly, in *Mangold* the direct effect was expressly linked to the general principle of law alone, not to Directive 2000/78. Besides, Krebber’s position would lead to the difference that Article 27 of the EU Charter, given the Information and Consultation Directives, would show the ‘*Mangold* effect’, whereas Article 28 and 30 rights would not. This is ultimately not defensible and comes more than close to according the horizontal direct effect to the directives concerned.

¹¹³ Case C-432/04 *Commission v Cresson* [2006] ECR I-6387.

Community law.¹¹⁴ Thus, the fundamental rights angle in *Cresson* is subtle but indeed still apparent. The former European Commissioner maintained that the lack of legal recourse (the possibility of appeal) against the ECJ's judgment constituted an infringement of the fundamental right of defence and the right to effective judicial protection. She observed that a European official may, by contrast, challenge a decision of the Appointing Authority before the Court of First Instance and then bring an appeal before the Court of Justice (paragraph 111). The Court responded that:

112 Reference should be made in this regard to Article 2(1) of Protocol No 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which provides that everyone convicted of a criminal offence by a court or tribunal has the right to have his conviction or sentence reviewed by a higher court or tribunal. *Even if it be accepted that that provision applies to proceedings based on Article 213(2) EC, it is sufficient to point out that Article 2(2) of that Protocol states that that right may be subject to exceptions in cases, inter alia, where the person concerned was tried in the first instance by the highest court or tribunal.* (italics added)

In paragraph 113, the Court concluded that the requirements of effective judicial protection were met in this case. However, based on the judgment it seems that the full Court of its own motion¹¹⁵ had recourse in paragraph 112 to Article 2(1) of Protocol No. 7 to the ECHR and noted the principle of judicial review. Its natural exceptions in the following sentence are then preceded by the somewhat ambiguous incipit '[e]ven if it be accepted that that provision applies to proceedings based on Article 213(2) EC...'. This conditional incipit may arise because, strictly speaking, Mrs. Cresson was not reproached in these proceedings because of an alleged criminal offence, but under civil law. In practice, paragraphs 112 and 113 of *Cresson* mean an application by analogy with Protocol No. 7, Articles 2(1) and 2(2), in proceedings based on Article 213(2) EC. Thus, paragraphs 112 and 113 as a whole mean, no less than that even the EC Treaty and thereby the internal disciplinary order of the EU is subordinated to fundamental or human rights aspects and even to a 'direct' application of the ECHR (although by analogy) with its Protocols. The Court did not repeat the usual fundamental rights formula with a reference to general principles of Community law, etc. Fundamental rights did not fall beyond the competence of the Community like freedom of expression in *Grogan*. *Cresson* can also be seen as a continuation of *Schmidberger*, where free movement of goods was eventually subordinated to freedom of assembly and expression. While the substance in *Cresson* is not close to that of this study, its universal fundamental rights view is also of indirect importance for European labour law that seeks new impetus in fundamental rights, especially for collective labour rights.

There are also recent developments regarding the Charter of Fundamental Rights of the European Union (the EU Charter). I have also discussed the Charter in my second publication in section 4.4.6, to which I generally refer. It suffices here above all to

¹¹⁴ Case C-150/90 *The Society for the Protection of Unborn Children Ireland Ltd v Grogan* [1991] ECR I-4685; on this judgment see also the first publication, section II.2.3.

¹¹⁵ The submissions of Mrs. Cresson, as explained by the judgment, do not seem to include this Protocol. At the same time, her reference to the position of 'ordinary' European officials is referred to. It is reasonable to suppose that had Mrs. Cresson referred to the Protocol, this would have been mentioned in the judgment.

note developments since the second publication with some additional remarks on justiciability and the overall impact of the Charter.¹¹⁶

Parliament v Council etc.

Since its proclamation, the EU Charter has been referred to and discussed by numerous opinions of Advocates General, as well as by some judgments of the Court of First Instance. The ECJ (the Grand Chamber) for its part has resorted to the EU Charter as an argument for the first time in the *Parliament v Council* judgment of 27 June 2006, in a case concerning Council Directive 2003/86/EC on the right to family reunification.¹¹⁷ The Court stated the overall status and importance of the Charter, under the heading of ‘The rules of law in whose light the Directive’s legality may be reviewed as follows:

38. The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.

Thus, the formal bridge for the reliance on the Charter was the reference to the Charter in the directive concerned, but at the same time this passage shows how the Court also relied on the Community legislator’s will to act in conformity with the Charter. Furthermore, the Court discussed the Charter substantively – thus relating to the merits of the case – in the context of Article 8 ECHR and the Convention on the Rights of a Child, as follows:

58. The Charter recognises, in Article 7, the same right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child’s best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.

Hence, the Charter also stressed the importance to a child of family life (as also in paragraph 59). As a whole, paragraphs 38, 58 and 59 of the judgment show how the Court really considered the Charter as a substantive argument. There will be no stepping back from the use of the EU Charter as a point of reference, interpretative source or substantive argument. Obviously the Court found that time was finally ripe, pending the full ratification of the Constitutional Treaty (at that time), to resort to the EU Charter in a judgment. One might see there is also a response to the criticism generated by *Mangold*. However, the EU Charter will also be a natural and

¹¹⁶ I come back to the references to national law and practice in section 3.4, *infra*, at footnotes 314 - 316.

¹¹⁷ Case C-540/03 *Parliament v. Council* [2006] ECR I-5769.

substantive point of reference and source of interpretation in the labour law cases covered by the Charter, like *Laval* and *ITF and FSU v Viking*, given the lacuna that the EC Treaty does not include any substantive regulation of freedom of association and the right to collective action¹¹⁸ and that the recognition of fundamental rights in Article 2 of the Monti-Regulation 2679/98/EC within free movement of goods is finally declaratory (on the effect of that specific Regulation), which is no legal guarantee (being simply an argument) against the possible effect of free movement of goods.

As a whole, even as a non-binding instrument, the Charter as now refined by *Parliament v Council*, is also a milestone in building up a European industrial relations system (discussed in sections 3.2 to 3.5, *infra*). A further confirmation of the role of the Charter as a source of EU law came in the *Unibet* judgment, in which the ECJ referred to it as a further foundation of the principle of effective judicial protection, ‘reaffirmed’ by Article 47 of the Charter (next to the ECHR and the constitutional traditions) as the judgment noted; in the *Advocaten voor de Wereld* judgment, the ECJ again referred to the EU Charter, this time regarding the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination.¹¹⁹ Thus, recourse to the Charter is already of settled case-law.

Justiciability Debate

The Court’s recourse to the EU Charter as an argument (or a source of law; it was in any case more than a mere source of inspiration) in *Parliament v Council*, etc. also leads us to tackle in brief the issue of justiciable and programmatic rights in the Charter. This is of interpretive relevance before the Reform Treaty renders the Charter legally binding (as is obvious). Of course, the Charter rights will only be directly justiciable in principle following a formal binding effect by the entry into force of the Reform Treaty which I touch on below and discuss further in section 3.4. The interpretive effect of the Charter as a non-binding instrument naturally depends on the power of the wording of the clause concerned. It may naturally overlap with the Treaty provisions and secondary EU law concerned. Basically the distinction between justiciable and programmatic rights also applies, *mutatis mutandis*, regarding the interpretive effect. Whereas the Charter is a proclamation of the Member States (although via the Council of Ministers), it would be natural to support a more binding effect now, and thus vertically (although not a binding effect *de jure*) vis-à-vis a Member State. This is not to deny the interpretive effect in horizontal relations, which exists as well. On the other hand, it is appropriate to note that the justiciability debate may also reflect a simplistic insight into the way the Charter functions. As de Búrca

¹¹⁸ See that I take Article 137(5) EC as a procedural norm implying only that the Community will not adopt a directive on freedom of association and right to strike under Article 137 EC. This does not definitively rule out a directive under Article 94 or a measure under 308 EC. See, however, the negative position of Syrpis in footnote 16, *supra*, and of Mengozzi at footnote 289, *infra*, and the more lenient vision of Ryan in footnote 286, *infra*. Lord Wedderburn has defended the possibility of a directive under Article 94, see footnote 286, *infra*. Judge Schintgen has found it open whether a directive on Article 137(5) matters could be based on Article 308 EC, see footnote 285, *infra*.

¹¹⁹ See case C-432/05 *Unibet*, judgment of 13.3.2007, nyr, paragraph 37; case C-303/05 *Advocaten voor de Wereld*, judgment of 3.5.2007, nyr, paragraph 45.

has stated, the Charter will normally function, like the ECHR, as a source of values and norms other than those set out in the other treaties, to influence the interpretation of EU legislative and other measures, and to feed into policy-making and into EU activities more generally.¹²⁰ This is where Fredman also sees the greatest present impact of the Charter, giving ‘the Court of Justice a sound basis on which to counter market freedoms.’¹²¹ However, given the differences in the wording of the Charter Articles on the one hand and the Article 52(5) inserted later (see below) on the other, it is not appropriate to avoid discussing justiciability further.

Hence, the background for the justiciability debate is that some members opposed the inclusion of social rights as entitlements at the convention drafting the Charter but were ready to recognise programmatic social rights, not justiciable, but subject to promoting, etc. policy measures. The outcome was that no separate section of programmatic social rights was included in the text¹²² but in some cases it clearly indicates the programmatic nature of the ‘right’ concerned, such as that regarding consumer protection where the ‘Union policies shall ensure a high level’ of such protection (Article 38).¹²³ Additionally, Article 51(1) of the original Charter refers to

¹²⁰ Gráinne de Búrca, ‘Fundamental Rights and Citizenship’, in Bruno de Witte (ed.) *Ten Reflections on the Constitutional Treaty for Europe* (European University Institute, 2003), p. 24.

¹²¹ Sandra Fredman, Transformation or Dilution: Fundamental Rights in the EU Social Space *European Law Journal*, Vol. 12, No. 1, January 2006, p. 57.

¹²² On this debate, see the brief explanation of Brian Bercusson, Social and Labour Rights under the EU Constitution, in de Búrca and de Witte (eds.), *Social Rights in Europe*, OUP 2005, pp. 170-171.

¹²³ The basic distinction between principles and rights is recognised by Judge Rosas, The Role of the European Court of Justice in the application and interpretation of social values and rights, in Elina Palola and Annikki Savio (eds.), *Refining the Social Dimension in an Enlarged EU*, Stakes, Helsinki 2005, p. 199. Rosas does not enumerate all the rights to be regarded as real (individual) entitlements, while he mentions Article 15 on the right to work as an entitlement and Article 38 on consumer protection as a principle (p. 199). He later refers to the fact that ‘some of the social clauses of the Charter are formulated as individual entitlements rather than principles’ and notes how the border-line between justiciable rights and mere principles is finally to be drawn by the Court (p. 200). Maduro, footnote 101, *supra*, p. 286, also recognises (as a future area of debate as well) the distinction between social rights and ‘goals’. Within the international human rights discourse, having a historical source in the distinction between civil and political rights on the one hand and economic, social and cultural rights on the other in the corresponding UN Covenants of 1966, it is already normal to stress the indivisibility, interdependence and interrelated nature of human rights. In this study, it is more linked to the debate on Article 34 of the Charter on social security rights (see the third publication, at footnote 213). As to the international law argument, see, e.g., Martin Scheinin Economic, Social and Cultural Rights: Models of Enforcement (lecture), IHRC conference, Dublin 9-10 December 2005, who has also argued for interdependence with non-discrimination as an example that does not allow any compartmentalisation into civil or social rights, etc. (p. 13). On the other hand, the UN itself has issued a Declaration ‘On the Right to Development’, adopted in 1986 (General Assembly resolution 41/128). Article 6, paragraph 2 of the Declaration provides that ‘All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.’ The same position was expressed by the 1993 Vienna Declaration on Human Rights, UN Doc. A/CONF.157/23 (1993), paragraph I.5 (<http://www.unhchr.ch>) and by the Declaration on the Occasion of the 50th Anniversary of the Universal Declaration of Human

respect of rights and observance of principles. The Charter, as redrafted by the Convention on the Future of Europe and the 2004 IGC, reiterates this distinction between rights and principles by providing that the principles will be judicially cognisable only in the interpretation of legislative and executive acts by the EU institutions and in ruling on their legality (Article II-112(5)). However, as to the hard core of collective labour rights, freedom of association for workers is clearly guaranteed like the right of everyone in trade union matters, i.e., the right to form and to join trade unions for the protection of one's interests in Article 12; the rights of workers and their organisations to collective bargaining and action in Article 28 would also be clearly justiciable. Since both articles expressly refer to 'rights' (instead of mere principles or 'recognised protection') they should not be subject to dissenting justiciability opinions, as is the case regarding Article 34 of the Charter.¹²⁴ There is also a difference between Articles 12 and 28 in that the latter refers to a right 'in accordance with Community law and national laws and practices'. The author does not find that this has any direct impact on the justiciability issue, although it necessarily entails a debate on the reference's effect.¹²⁵ In any case, Article 28 also includes the reference to Community law, implying protection there as well (not just possible and limited restrictions).

The value and impact of fundamental rights is paramount in the pending *Laval* and *Viking* cases, on which I will make more detailed remarks in sections 2.5 and 3.3, *infra*. Besides, within the field of fundamental rights, these cases engage a *collective* right (indeed, the right to *collective* action, as the right of workers' organisations as well, also expressed by Article 28 of the EU Charter in addition to the ILO tradition and Article 6(4) ESC) whereas historically fundamental rights have been understood and developed primarily as individual rights.¹²⁶ Furthermore, these cases will probably illustrate how fundamental rights are a natural part of *ordre communautaire social*.

Member State Obligation

A remark is also still needed on the status of EU fundamental rights at the Member State level. The doctrine and international legal instruments within human or fundamental rights have markedly changed the EU 'law landscape' at the national

Rights adopted by the Council of Europe Committee of Ministers Meeting of Deputies on 10 December 1998, paragraph 4 (<https://wsd.coe.int>). It seems that the debate on the EU Charter forms a *sui generis* discourse in relation to the international one.

¹²⁴ See the position in the previous footnote and the discussion about Article 34 of the Charter in the third publication, at footnote 213.

¹²⁵ See the comments in section 3.4, *infra*, at footnotes 314-316.

¹²⁶ There is no need to explore in detail the nature of the right to collective action in the Member States. In the Nordic-German tradition, Ireland and Greece it is a right of the organisations, whereas in France, Belgium, Netherlands, Austria and UK as well as in the Mediterranean tradition (save Greece) it is an individual right. See further, e.g., Robert Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective* (Part II), IJCLIR, Vol. 20/1, 2004, p. 110-111. It is essential is that the EU Charter express both the individual and collective tradition.

level as well.¹²⁷ In *ERT*, the ECJ (small plenum) unambiguously covered the protection of fundamental rights (and the reach of its jurisdiction), meaning measures of the Member States within the ‘scope of Community law’.¹²⁸ Furthermore, *Schmidberger* laconically remarks, as a conclusion flowing from Article 6(2) EU, how infringements of fundamental rights are ‘not acceptable in the Community’.¹²⁹ Consequently, whereas the right to collective bargaining and action ultimately do fall under the ‘harmonious, balanced and sustainable development of economic activities’ (Article 2 EC), i.e., the scope of EU law, the Member States and their courts are also enjoined to respect the fundamental rights as defined by the EU and/or the ECJ as the guardian of general principles of Community law in the EU.

Concluding Remarks

In concluding one may state that, as to collective labour law, the respect for fundamental and human rights in the EU relies both on internal and international law sources, notably the European Social Charter and ILO Constitution and Conventions regarding social matters. The broad line of development since *Stauder*¹³⁰ on the other hand shows the ever-growing impetus of fundamental social rights, also reflected by the amendments of the EC Treaty and new secondary legislation, especially by the Article 13 EC directives, and the adoption of the EU Charter of Fundamental Rights. Despite these developments the market freedoms and competition rules will obviously be equally fundamental for the Community legal order for quite some time while the scales are seemingly tipping in favour of fundamental rights (as *Parliament v Council* and *Cresson* indicate). At the same time, it already is justified to conclude that the ‘all-encompassing and overriding role [of the market freedoms and competition rules] seems to belong to the past’.¹³¹ Still, in the field of collective labour law *Laval* and

¹²⁷ The change has been remarkably salient, not just in the new Member States from Eastern Europe but also in Finland that for political reasons did not adhere to the Council of Europe until 1989 and the ECHR 1990.

¹²⁸ See C-260/89 *ERT v. DEP* [1991] ECR I-2925, paragraphs 41 and 42.

¹²⁹ See case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 73; in paragraph 75 *Schmidberger* defines the scope of the fundamental rights obligation as being that of Community law. The author does not find that the narrower wording of the human rights obligation regarding the Member States (i.e., when they implement the Union law), present for case-related reasons in the recent judgments within the Justice and Home Affairs pillar, such as C-303/05 *Advocaten voor de Wereld*, judgment of 3.5.2007, nyr, paragraph 45, has any effect on that obligation as defined in *ERT* and *Schmidberger*. See also the discussion at footnotes 310 to 312, *infra*. A pending case, C-361/07 *Polier v Najar*, lodged 2.8.2007, includes the question about the validity of the French loose dismissal rules under the New Recruitment Contract (*Contrat Nouvelle Embauche*) in light of 1. ‘European law, as defined in the Charter of Fundamental Rights’; 2. ILO Convention 158; and 3. the European Social Charter. While the EU’s secondary law does not include dismissal rules, this case might still shed further light on the fundamental rights obligations of the Member States, the effect of the EU Charter and the role of the ILO and Council of Europe provisions.

¹³⁰ Case 29/69 *Stauder* [1969] ECR 419.

¹³¹ See Allan Rosas, The Role of the European Court of Justice in the application and interpretation of social values and right, in Elina Palola and Annikki Savio (eds.), *Refining the Social Dimension in an Enlarged EU*, p. 201.

Viking include reference questions that – following the path opened by *Albany* – may lead to judgments comparable to *Defrenne II* that launched the path for equal pay towards a mature ‘fundamental human right’.¹³²

This picture of the growing impetus of fundamental rights in the EU legal order generally and its labour law, especially collective labour law, will be subject to a historically and qualitatively new step via the Reform Treaty of 2007, the basic contents of which were decided upon by the Brussels Summit of 21/22 June 2007. The EU Charter will become legally binding in 2009 – having the same legal value as the Treaties in the Member States other than Poland and the United Kingdom.¹³³ While I will discuss its effect in some more detail in section 3.4, *infra*, two elementary remarks must be made here. First, the binding Charter paves the way to a final paradigmatic change in assessing the relationship between fundamental labour rights and market freedoms, thus endorsing with good reason the argument that the latter should be seen primarily as restrictions of the former in a conflict, not the other way round as the historical burden in EU law has suggested until recently. Second, the binding Charter will intensify the debate and probably cause litigation involving the question about justiciable and programmatic rights, as well as the effect of the references to national law within the Charter.

1.4.5 The European Social Model and Social Dialogue

Just basic remarks about the European Social Model and Social Dialogue suffice here. What are the basic elements of the European social model, an ideological cornerstone in an *ordre communautaire social* approach? In 1994, the Commission published a White Paper on social policy that described a European social model as including ‘democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity’.¹³⁴ What really distinguishes the European social model from those in the USA and Japan is the role of collective bargaining and collective agreements in defining working conditions.

¹³² ‘Fundamental human right’ was the expression used (inter alia) by case C-50/96 *Deutsche Telekom v Schröder* [2000] ECR I-743, paragraph 57. On *Defrenne II*, see section 2.7, *infra*. As to early ECJ practice, I am reminded of the classic human rights case concerning trade union rights within free movement of workers, 36/75 *Rutili* [1975] ECR 1219, paragraph 52. Those rights in general terms were protected under EC law against any adverse effect by a Member State. The ECJ also relied on Articles 8 to 11 ECHR, beside Article 8 of Regulation 1612/68/EEC.

¹³³ See Presidency conclusions, Annex 1, point 5, p. 25; www.consilium.europa.eu.

¹³⁴ White Paper on European Social Policy. A Way Forward for the Union, COM (94) 333, p. 9. The Nice European Council in 2000 defined the European social model as follows: ‘The European Social Model, characterized in particular by systems that offer a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based ... on a common core of values’. These values mean ‘solidarity and justice as enshrined in the Charter of Fundamental Rights’ (paragraph 11). The European Parliament recently noted that ‘social dialogue in its various manifestations is an essential element in the traditions of the Member States’. At the same time it requested ‘the renewal of the social dialogue at both national and European level and the development of a greater role for the dialogue at European level’; see the Resolution on a European Social Model for the future, 6.9.2006, paragraph 25; document P6_TA-PROV(2006)0340.

The most salient feature is determining pay by collective agreements at sectoral level via the extension procedures of collective agreements (*erga omnes*)¹³⁵ that usually lead to a coverage of workers ranging from 90-100% in Austria, Belgium and Slovenia, 80-90% in the Nordic countries, 70% in Germany, less than 40% in the UK and most of the new Member States, and only 15% in the USA.¹³⁶

Other dimensions are also important in the European social model. These range from European Works Councils (directive 94/45/EC) and company level cooperation in the form of workers' participation, now compulsory in the EU since Directive 2002/14/EC on information and consultation, to sectoral and intersectoral national cooperation (and bargaining) that covers a wide range of working life issues and influences the drafting of legislation. This national structure is complemented by the European social dialogue, anchored in Articles 136, first subparagraph, 138 and 139 EC, which include the possibility of negotiated legislation and independent European collective agreements, as well as covering the participation of the European social partners, the ETUC, BusinessEurope (ex UNICE), UEAPME and CEEP, even in the macroeconomic dialogue with the relevant Community institutions. Furthermore, the Commission is obliged to consult the social partners on matters of social policy concerning the 'possible direction of Community action', and the social partners have a kind of a privilege to enter into negotiations on these matters. This structure is – this said without any screening of national constitutional provisions – obviously more corporatist than the procedures at the national level where, at least on paper, the ILO modeled tripartism (mainly consultative)¹³⁷ functions in drafting social legislation. At the EU level, the negotiated legislation emerges without the European Parliament having any official status in the proceedings while it has been informed by the Commission and has delivered a resolution on the subjects concerned. The formal absence of the European Parliament led the Court of First Instance in the *UEAPME* case to apply a collective representativity test: 'the principle of democracy on which the Union is founded requires...that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council...with a legislative foundation at Community level'.¹³⁸ Thus the Court of First Instance clearly found that

¹³⁵ There is no extension possibility in Denmark, Sweden and the UK.

¹³⁶ The figures are given by Brian Bercusson and Niklas Bruun, *European Industrial Relations Dictionary* 2005, p. 6.

¹³⁷ See, e.g., Conclusions concerning tripartite consultation at the national level on economic and social policy, International Labour Conference, 1996.

¹³⁸ Case T-135/96 *UEAPME* [1998] ECR II-2335, paragraph 89. In this case the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) challenged the Parental Leave Directive because the UEAPME was excluded from the negotiations on the agreement underlying the directive. For a detailed discussion on this case, see, e.g., Brian Bercusson, *Democratic Legitimacy and European Labour Law*, ILJ, Vol. 28., No. 2, June 1999, pp. 153-170. See also Jari Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*. Labour Policy Studies No. 259, Ministry of Labour (Finland) 2004, pp. 115-127.

collective bargaining at the EU level constitutes a form of representative democracy. It is in this sense thus also an issue of public law.¹³⁹

The social dialogue at EU level has official recognition in the Treaty and clauses on freedom of association and the right to collective bargaining in the EU Charter of Fundamental Rights (Articles 12 and 28). National collective agreements have been directly recognized, e.g., by the Transfer of Undertakings (Acquired Rights) Directive, the Working Time Directive, the Posted Workers Directive and in the Article 13 Directives (the Racial Directive and the Employment Framework Directive), and as a general tool in the implementation of directives in Article 137(3) EC. Furthermore, the social partners are involved in the EU employment policy.

The ideological premise of the European social model may be called social partnership, i.e., the settlement of various working life matters, particularly working conditions, by negotiation and agreement between management and labour. The importance of the social policy objectives pursued by these agreements also obtained principal recognition in the *Albany* judgment, which established the conditioned immunity of collective agreements from EC competition rules; see the third publication, Chapter I.

1.4.6 Non-discrimination on the Basis of Nationality

The fundamental legal principle of equal treatment irrespective of nationality is one of the cornerstones of the Community, as expressed in ex-Article 7 EEC, then Article 6 EC and now Article 12 EC. That directly applicable provision¹⁴⁰ applies unless specific non-discrimination clauses in the Treaty are of use, such as Articles 39(2), 49 and 50(3) EC.

The principle of equal treatment has been elaborated in free movement of workers by Regulation 1612/68 (Regulation 1408/71 in the field of social security of migrant workers) and, within free provision of services, by the Posted Workers Directive 96/71/EC (PWD). Within this directive, equal treatment means generally that the posted construction workers are directly subject to same (agreement-based) pay provisions as domestic workers by virtue of the directive¹⁴¹ and the Member States

¹³⁹ The public law aspect ('the CFI has made it a public law issue') is also noted by Catherine Barnard, *The Social Partners and the Governance Agenda*, *European Law Journal* Vol. 8, No. 1, March 2002, p. 97.

¹⁴⁰ See, e.g., Kapteyn and van Themaat (ed. Gormley), *Introduction to the Law of the European Communities*, 3rd ed., pp. 172-173. Kapteyn and van Themaat refer to cases 293/83 *Gravier v. City of Liège* [1985] ECR 593 and 36/74 *Walrave & Koch* [1974] ECR 1405 and refer as an example of systematic discrimination in employment relationships and hold that there can be no reason why such treatment would not infringe Article 39 EC. There is also case 1/78 *Kenny* [1978] ECR 1489, paragraph 12, where the ECJ confirmed the direct applicability of the first paragraph of Article 7 EEC within the field of Regulation 1408/71, 'as implemented by Article [39(3)]' and the Regulation. On *Walrave & Koch*, see also section 4.2 of the second publication.

¹⁴¹ The German system is an exception in this sense; see sections 3.3 and 3.4 of the second publication.

have the option of requiring compliance with collective agreements regarding all sectors (Article 3(10) PWD).

The ban on discrimination based on nationality extends to any covert discrimination.¹⁴² On the other hand, unequal or differential treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions.¹⁴³ Finally, unequal treatment could be justified by the exceptions stipulated in Articles 39(3) (migrant workers) and 55 EC (referring to Article 46; posted workers) on grounds of public policy (*ordre public*), public security or public health.¹⁴⁴ The role of these exceptions in employment matters is extremely limited, if existent at all regarding migrant workers, and, in the case of posted workers, non-existent within the hard core of working conditions enumerated in Article 3(1) of the Posted Workers Directive.¹⁴⁵

The possibility of the Member States adding items to the hard core of compulsory working conditions in Article 3(1) PWD has been only of academic interest so far. It is, however, worth a brief comment because it is linked both to equal treatment and the basic nature of the PWD.¹⁴⁶ Thus, outside the rank of the hard-core issues in Article 3(1) PWD, the Member States can – respecting the Treaty and equal treatment as Article 3(10) PWD expressly states – require compliance with the host state benefits if they are of public policy (*ordre public*) nature. On the other hand, Article 3(7) shows that the PWD is a minimum directive that does not prevent the application of more favourable conditions of employment. This clearly refers to the relatively free

¹⁴² Case 61/77 *Commission v. Ireland* [1978] 4117, paragraph 78.

¹⁴³ See inter alia case C-147/03 *Commission v Austria* [2005] ECR I-5969; case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27, and case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 36.

¹⁴⁴ As to public policy (*ordre public*) exceptions to free provision of service, see also section 4.9.3 of the second publication.

¹⁴⁵ The requirement to apply the minimum conditions, pay included, to posted workers in a collective agreement in force in the host state extends by virtue of the Directive (Article 3(1)) to the construction sector, as defined by the safety and health directive 92/56/EC. The Member States are entitled to extend this to cover collective agreements in all sectors (Article 3(10)). In practice, according to the Commission, the vast majority of those Member States where collective agreements are made universally applicable require that, in the sector(s) covered by the relevant collective agreement, undertakings established in another Member State comply with the terms and conditions of employment listed in Article 3(1) of the Directive which are laid down in the collective agreements. Germany and Hungary are exceptions in this regard, having put in place limitations in this area. See Commission Staff Working Document; Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2006) 159 final, p.19.

¹⁴⁶ I also refer to my example in footnote 55 of the second publication, where I raised as an extreme example the issue of a paid 50th anniversary only in the host state collective agreement, thus whether it is within the concept of pay in the sense of Article 3(1) PWD. I left the issue without any proposed or predicted outcome. I now wish to stress the principle of equal treatment that requires that if a host state worker is entitled to a paid 50th anniversary, the same should apply to a posted worker. However, since it would not be a surprise to see the opposite decision in light of *Portugaia*, footnote 149, *infra*, the benefit as not 'augmenting significantly' the protection of the posted worker.

hand on the part of the Member States to extend the hard-core list in Article 3(1). A succinct explanation is that even as a minimum directive the PWD applies in the framework of the Treaty,¹⁴⁷ i.e., the restrictions on free provision of services have to pass the *Arblade* test, be justifiable with the overriding requirements of general interest, and be apt for their purpose and not go beyond what is necessary to attain it.¹⁴⁸ In practice, the *Commission v Germany* case shows that the proportionality assessment works as a final safety valve against social protectionism. A source for a practical solution one finds in *Arblade* itself, where the Court held that imposition of payments of wage components via a host state social fund requires an ‘advantage capable of providing [the posted workers] with real additional protection which they would not otherwise enjoy’ (paragraph 54).¹⁴⁹ Even so, an ultimate weighting in assessing the advantage concerned, normally under the interpretation of ‘public policy’, will obviously happen between the basic objectives of the Directive of free provision of services and protection of workers.¹⁵⁰

In case of posted workers, the ECJ has also accepted in *Finalarte* a ‘positive’ differential treatment of posted workers so as to strengthen their protection in realising the payment of holiday pay.¹⁵¹ This line-drawing was clearly connected, although not via an express reference to the specific need of protection for posted construction workers in the *Finalarte* judgment, recognised already in judgements *Guiot* and *Arblade*.¹⁵²

¹⁴⁷ This is the main point of the first chapter of my second publication.

¹⁴⁸ On the *Arblade* test, see section 1.2.3 of the second publication. On the proportionality test, see sections 2.2.5 (in the context of *Wolff & Müller*) and sections 3.3.3 and 3.4 (in the context of the *Commission v. Germany* case) of the second publication.

¹⁴⁹ A similar definition is in case C-164/99 *Portugaia* [2002] ECR I-787, paragraph 29, which, although relating to the justification of the imposition of host state pay provisions in the light of the protectionist grounds of the German posting law AentG, referred to ‘a genuine benefit on the workers concerned, which significantly augments their social protection.’

¹⁵⁰ This weighting is the ultimate ‘solution’ also found by Eeva Kolehmainen and Ulla Liukkunen (who however seems to anticipate ‘a quite narrow’ interpretation of Article 3(10)). See Eeva Kolehmainen, *The Posted Workers Directive: European Reinforcement of National Labour Protection*. European University Institute, 2002, pp. 47-50; Ulla Liukkunen, *The Role of Mandatory Rules in International Labour Law; A Comparative Study in the Conflict of Laws*. Talentum, Helsinki 2004, pp. 185-187.

¹⁵¹ The differential treatment is linked to the payment of holiday pay via a paid leave fund (called ULAK at that time, nowadays SOKA-BAU). The contributions paid by the employer to the fund form the holiday pay. For domestic workers, this money is paid from the fund to the employer, to be forwarded to the workers concerned. The fund pays the holiday entitlement for workers posted by an employer from another Member State (or from third countries) directly. This system was challenged as forbidden unequal treatment under Articles 59 and 60. The ECJ found, first, that it was for the national court to verify whether this system was disadvantageous for domestic employers (which was clearly unlikely), and, second, that there were in any event objective differences in the situation of foreign and domestic employers. The ECJ referred to the question of whether the worker really gets the holiday pay and naturally found that it was more effective to pay the posted workers directly. Accordingly, these objective differences justified the different treatment; see joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraphs 60-65.

¹⁵² See cases C-272/94 *Guiot* [1996] ECR I-1905, paragraph 16, and C-369/96 *Arblade* [1999] ECR I-8453, paragraph 36.

Equal treatment in the field of free movement of workers also implies a protective element in relation to domestic workers, who have an interest in prohibiting pay offers and work by migrant workers with conditions lower than those applicable to them. This is what the ECJ confirmed in 1974 in an infringement case against France.¹⁵³ It must equally be taken into consideration when assessing a collective action against such behaviour. EU law cannot shield any behaviour violating the principle of equal treatment, whether within free movement of workers or in posting of workers. Consequently, it is clear that a collective action by workers and their organizations that would intentionally infringe equal treatment in Articles 12 and 13 EC cannot be protected by EU law. On the other hand, so far as I know, no Member State has passed law on this subject.¹⁵⁴

Coming back to the essential, i.e., the broad-brush explanation of equal treatment regardless of nationality in EU law, it is crucial to note that the EU Charter of Fundamental Rights Article 21(2) also enshrines it. It is thus a fundamental and constitutional principle, and a natural component of any paradigmatic presentation of EU labour law as well.

¹⁵³ Case 167/73 *Commission v France* [1974] ECR 359, paragraph 45: ‘The absolute nature of this prohibition [against discrimination], moreover, has the effect of not only allowing in each state equal access to employment to the nationals of other Member States, but also ... of guaranteeing to the State’s own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law, since such acceptance is prohibited.’

¹⁵⁴ I recall that in judgment KKO 2000:94 *Estonian Shipping Company (Rakvere)*, (see section 4.10.5 of the second publication) the Supreme Court of Finland foresaw an express prohibition in directly applicable EC law for the prohibition to be legitimate. The sensitivity of the issue is reflected by the fact that the British High Court in case C-438/05 *The International Transport Workers’ Federation and the Finnish Seamen’s Union (FSU) v. Viking* (see section 4.10.5 of the second publication) found that the action threatened by the FSU would amount to direct discrimination, when and if the FSU demanded that the Estonian crew on board the re-flagged Viking Rosella get a Finnish wage. The High Court saw direct discrimination in the fact that the FSU in its press releases also spoke about protecting Finnish jobs and that such a demand would lead to excluding the Estonian seafarers from the jobs concerned (paragraphs 118-120 of the judgment). The Court of Appeal, which referred the case to the ECJ, did not adhere to this discrimination reasoning of the High Court.

Chapter II

Economic and Social Factors in the Light of *ordre communautaire social*: Recapping the Development of Economic and Social Factors from Previous Articles

2.1 General Remarks

Considering *ordre communautaire social* as an EU labour law paradigm requires a historical approach. Within such an approach it is useful and illustrative to draw attention to the main characteristics and developments of the social and economic factors as reflected in my previous publications. I do not maintain that the relationship between these factors explains everything essential, but it is at least a good bridge into a comprehensive discussion.

Deviating from the much more social approach of the European Coal and Steel Community (ECSC), the European Economic Community was built up and assumed a markedly functional way of integration from the outset, that concerning the establishment of the common market with free competition. Upward harmonisation was the supposed result of the functioning of the Common Market (the Common Market credo). Social partners the Community did not recognise at all. In sum, it was the European *Economic* Community with some embryonic characteristics of independent labour law (in addition to free movement of workers), such as equal pay (Article 119 EEC) and the ‘equilibrium of paid annual holidays’ (Article 120 EEC). However, the Treaty structure also laid down the necessary foundations for future development of the interplay between economic and social dimensions.¹⁵⁵

2.2 Collective Redundancy and Transfer of Undertaking (Acquired Rights) Directives

The Treaty of Rome remained intact when E(E)C employment law started to emerge in the 1970s, which means that only a change in the shared system of values explains this emergence. This change of values, also related to the first oil crisis in the early 1970s and favourable political changes in France and Germany, resulted in the labour law directives of 1970s on collective redundancies, equal pay and equal treatment and transfer of undertakings. The social dimension gained new ground. The Collective Redundancy Directive did not touch on the employer’s prerogatives but remained, notwithstanding the promise on harmonising the redundancy conditions in the Preamble, essentially procedural, let alone dealing with problems like those in multinational companies, such as whether they have looser requirements for material grounds for dismissal. This is still true today, although directive 92/56/EC added the responsibility of the daughter company for negligence by the controlling undertaking of the directive (Article 2(4)) concerning information and consultation of workers. The same rule was added to the Transfer of Undertakings (Acquired Rights) Directive 98/50/EC, a directive which has more teeth. While its main effect is to transfer the

¹⁵⁵ More details appear in the first publication, pp. 3-9.

employment relationships, it also transfers the collective agreement concerned for at least a year following the transfer (unless it expires earlier or is replaced by another agreement). In this sense, the directive already operated with collective agreements in the 1970s.

The Transfer Directive does not aim at preventing even pure transfers in shareholders' interest operationally, but smoothes them and protects workers' rights as much as possible. In any case, it is not justified to say that as a specific act it realises the supremacy of an economic factor in EC law. It rather represents a general balance between the economic and social factors. The alleged transferee in the *Allen et al. v Amalgamated Construction* case invoked competition rules so as to prevent a transfer within a group of companies from falling within the ambit of the Directive. The Court dismissed this argument with the assertion that 'nothing' justified it, which was finally based on social values. The social purpose of the Directive counted for more than this economic argument about competition.¹⁵⁶

As a whole the Transfer Directive is perhaps the most penetrating part of secondary European employment law, especially by governing the concept of transfer and covering also cross-border transfers.^{157 158} Seen in terms of fundamental rights, it implements the information and consultation rights of the 1989 Community Charter (points 17 and 18) and the EU Charter (Article 27), as does the Collective Redundancy Directive. Only the Transfer Directive really implements material protection against unjustified dismissal (Article 30 of the EU Charter)¹⁵⁹ while the

¹⁵⁶ Case C-234/98 [1999] ECR I-8643; see section II.2.3 of the first publication, especially p. 33. See also chapter II, section 2.7 of the first publication.

¹⁵⁷ As a detail to be elaborated I mention the upwards harmonisation in the context of the Transfer Directive. In the first publication (p. 44) I mentioned that the consolidated Transfer Directive 2001/23/EC no longer includes a reference to upwards harmonisation (thus, to Article 136, which succeeds Article 117 EC). What the consolidation directive still spells out (fifth recital of the preamble) is the reference to the Community Charter of the Fundamental Social Rights of Workers of 1989 point 7, which states that 'The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community'.

¹⁵⁸ The Commission has now also published Bob Hepple's 1998 report 'The Legal Consequences of Cross-border Transfers of Undertakings within the European Union' (http://ec.europa.eu/employment_social/labour_law/documentation_en.htm#21) on the internet, in which he discusses these transfers (especially pp. 3 to 7), however, not transfers specifically within a group of companies that I covered in my first publication (section 2.2.3). Gaul et al. (CMS Employment Practice Area Group), Study on the Application of Directive 2001/23/EC to Cross Border Transfers of Undertakings, European Commission 2006 discusses the effects of cross-border transfers in nine Member States and proposed amendments in the Directive.

http://ec.europa.eu/employment_social/labour_law/documentation_en.htm#21. They, too, see no problem in principle over transfers within a group of companies. Finally, the Commission published a report on the application of Directive 2001/23, COM(2007)334 final on 18.6.2007, and launched the consultation of the social partners under Article 138 EC on possible amendments to the Directive on 20.6.2007, although only in the context of a change of work-place at cross-border transfers.

¹⁵⁹ Judgment (26.10.2006, nyr) of the Civil Service Tribunal in case F-1/05 *Landgren v Commission* shows how Article 30 of the EU Charter of Fundamental Rights was used as a legal source, together with the ILO's Termination of Employment Convention 158 and the

Redundancy Directive is essentially procedural. The background for this is that the Redundancy Directive requires notification of the reasons for the projected redundancies as well as the obligation to negotiate with a view to reaching an agreement, and a protective element of economic nature, but it does not in itself set up any 'redundancy threshold', such as whether the redundancies are just an *ultima ratio* as in Austria, Belgium, France and Germany. In general terms these two directives, each in their particular ways, (more or less) still reflect the principle that 'labour is not a commodity', are also linked to fundamental rights and represent the negotiation tradition of the European social model, the Redundancy Directive by requiring negotiations directed at an agreement and the Transfer Directive by transferring the collective agreement concerned as well. They thus seem now to be tied to *ordre communautaire social* in several ways.¹⁶⁰ An issue as such is that both directives guarantee information and consultation only at the level of a subsidiary instead of the controlling undertaking, a lack emphasized by the growing transnational (even global) restructuring of enterprises. This deficiency is, of course, alleviated to some extent (in groups of companies with at least 1000 employees of whom 150 are in each of at least two Member States) by the fact that the European Works Council Directive imposes information and consultation in restructuring cases involving establishments in at least two Member States.

Taking the 'labour is not a commodity' maxim and protection against unjustified dismissal more seriously and governing the relationship between management and labour more comprehensively would require defining the redundancy threshold and redundancy payments in the Collective Redundancy Directive in the spirit of *ordre communautaire social* above all.

2.3 Machinery Safety

Machinery safety was one of the topics discussed in the first publication, highlighting the point that only safe machines are allowed onto the market under Article 2(1) of the Machinery Directive 98/37/EC (MD). The social aspect 'works' as a precondition for

Revised European Social Charter, in interpreting the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities respectively; see paragraphs 69-72. Materially the case concerned grounds for dismissal and their compulsory expression. Article 30 of the EU Charter, read in line with Article 24 of the Revised European Social Charter, is obviously to be interpreted as also covering protection in collective redundancies for economic/collective reasons; see Niklas Bruun, Protection against unjustified dismissal, in Bercusson (ed.), European Labour Law and the Charter of Fundamental Rights, Nomos 2006., p. 351. This interpretation supports adding substantive norms on redundancy payments to the Collective Redundancy Directive.

¹⁶⁰ As a 'direct application' of *ordre communautaire social*, Bercusson has come up with a proposal to amend the Transfer Directive to cover transfers of undertaking realised by purchasing the shares of an undertaking as well. This would lead to disclosing information and consulting the representatives of the employees affected by the transfer. It would mean 'a foothold gained for worker involvement in share transfers on the stock market'. Other purely financial transactions could be functionally linked to a change in the enterprise substantial enough to equate to the transfer of an undertaking. Brian Bercusson, Results of the "Paths to Progress" Working Group, the ETUC's 'Paths to Progress' Conference, Vienna 19 May 2006, paragraphs 25 and 26; available via http://www.etuc.org/IMG/doc/Discussion_paper_Bercusson.doc.

the enjoyment of the economic freedom (free movement of goods) whereas the essential safety requirements set up by the MD also cover machines not marketed in other Member States. This is the result of the exhaustive harmonization of the essential safety requirements.¹⁶¹ At the same time, the structure in the MD (safety, the social factor, precedes the economic freedom) in principle militates against superiority of the economic freedom. In practice the issue may be much more complicated once a machine gets a compliance certification from a so-called notified certification body.

As an example of a situation where national measures concern free movement of goods tested and certified in another Member State, I referred in the first publication to the *A.G.M.-COS.MET v Suomen valtio (the Finnish State) and Lehtinen* case.¹⁶² This concerns compensation for the damage AGM claims to have suffered in the form of reduced sales as a result of breaches of the MD in the form of the public conformity criticism expressed by the market supervisor Lehtinen; despite this criticism the Finnish authorities issued a positive market supervision decision. AGM has also directed its compensation claim against Lehtinen.

At the heart of the case is the material question of conformity with the MD of a vehicle lift used in garages, a machine involving working under a heavy load and therefore being particularly risky in the sense of the Directive. However, the ECJ did not answer a particular conformity question posed by the national court in its judgment of 17 April 2007 because Finland had not resorted to the possibility under Article 7(1) MD of exceptionally withdrawing a machine from the market for safety reasons; see paragraphs 60 to 65 and 74 of the judgment. Thus, the conformity presumption was in force, based on the compliance certification granted in another Member State. The Court decided literally to respect the institutional structure and status of the Member States in implementing the Machinery Directive. In so doing it also avoided any reasoning on the status of safety and health in EU law in principle, tied as it is at least to Article 31 of the EU Charter of Fundamental Rights and free as it should be from any diluting proportionality doctrine.¹⁶³

However, there was a legitimate expectation, certainly on the basis of the effective judicial protection of the market inspector Lehtinen, that the Court would have answered the particular question on the conformity of the machine, given the settled case-law expressed in *Bosman*, where the Court stated that ‘it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose’.¹⁶⁴ This ‘obviously no relation’ doctrine gave way to the particular status of the Member States in the implementation of harmonised secondary law, since as long as a Member State has not prohibited marketing of machinery under Article 7(1) MD, the conformity presumption is valid and the Court does not answer questions linked to possible non-conformity. On the other hand, a legitimate expectation is that the Court would answer such a question in a preliminary reference in the proceedings instituted by a

¹⁶¹ Article 95(3) EC leaves a tiny opportunity for national safety norms which I pass over here.

¹⁶² Case C-470/03, preliminary ruling of 17.4.2007, nyr; see also section II.2.5 of the first publication.

¹⁶³ For the proportionality reasoning, see section 2.5 of chapter II in the first publication.

¹⁶⁴ Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61.

trade union. Hence, whereas the principle of effective judicial protection is a general principle of Community law, affirmed by the ECHR and reaffirmed by the EU Charter of Fundamental Rights,¹⁶⁵ it seems clear that a trade union must be able to challenge a conformity decision of a Member State, i.e., before national courts and obviously leading to a substantive preliminary ruling by the ECJ. Otherwise these decisions would fall outside effective judicial control, infringing the ECHR and the EU Charter.

However, the judgment in *AGM-COS.MET* illustrates the close link between the substantive and procedural aspects of the Machinery Directive. In this case the safety experts of the then 25 Member States and the Commission have adopted the position that the machine does not conform.¹⁶⁶ Obviously only the Finnish administration disagrees. Nevertheless, so far these AGM-proceedings show the superiority of the economic freedom over the health and safety aspects inherent in machinery safety. It remains to be seen whether this will be the final position.

What then can be said about the AGM proceedings in the light of *ordre communautaire social* thinking? The first remark is that the MD does not foresee effective judicial protection (required by Articles 6 and 13 ECHR, as well as by Article 47 of the EU Charter of Fundamental Rights) in a case like this, requiring it only in the reverse situation, i.e., for the producer or importer if a machine has been withdrawn from the market by the authorities. The MD should be amended accordingly, although the effective judicial protection as a general principle of Community law must lead to a legal remedy available to at least the workers concerned and their representatives. Secondly, the treatment reserved for mechanics working under a heavy load does not conform to the ‘labour is not a commodity’ premise. It seems to be that as long as they work under a heavy load on the AGM lift their safety and health situation is not being taken seriously. Thirdly, the introduction of the lift type concerned in the 1990s meant a deterioration of the health and safety position which runs counter to the principle of improved working conditions. Fourthly, the right to healthy and safe working conditions is a fundamental right (Article 31 of the EU Charter). These points corroborate the conclusion on the substantive non-conformity of the machine. It remains to be seen if a complaint by the Finnish Metalworkers’ Union might lead to a decision by the Commission to withdraw the machine concerned from the market, or if new national judicial proceedings may lead to a substantive conformity decision by the ECJ, as seems the most probable scenario.

2.4 Posting of Workers

There is no need to repeat the general analysis on the social dimension in posting of workers within the free provision of services which fills the first chapter of the second publication. Some succinct remarks suffice. Indeed, the developments in posting of

¹⁶⁵ See, e.g., case C-432/05 *Unibet*, judgment of 13.3.2007, paragraph 37.

¹⁶⁶ See the position of the ‘Working Group 98/37 Machinery’ that, preceded by the Commission and gathering the experts of the Member States, works in connection with the Commission; the position is expressed by the data sheet of 1.7.2004, document CNB/M/08.016, of the Coordination Body of the bodies notified under the Machinery Directive.

workers are based on the seminal interpretation of the Treaty in the *Seco* case in 1982, according to which Community law does not prevent the Member States from extending their laws and collective agreements relating to minimum wages to posted workers (extension right). The Advocate General had proposed the obligation to tolerate low-wage competition from other Member States in posting situations as a fundamental feature of the Common Market.¹⁶⁷ In *Arblade*, the full Court reconfirmed the overall status of protection of workers as an overriding requirement of general (public) interest justifying restrictions to the fundamental freedom of provision of services and the extension right (application of national minimum wages in law or collective agreements to posted workers) as a response to a particular question posed by a national court. It is justified to speak about the *Arblade* test in assessing labour law restrictions on free provision of services.¹⁶⁸ The extension right is its intrinsic corollary.

In the first publication, I have already referred to the fact that economic aims cannot constitute grounds of public policy or overriding reasons of general interest justifying restrictions on the free provision of services.¹⁶⁹ The first chapter of the second publication for its part showed above all how the Posted Workers Directive (PWD) is to be understood today as a political confirmation of the Court's case-law (*Seco*, *Rush Portuguesa*, *Vander Elst*), according to which protection of workers enables the Member States, respecting the obligations of Treaty, notably proportionality,¹⁷⁰ to extend their hard-core employment law provisions (especially those on pay, working time and paid annual holidays) to posted workers. In the construction sector the Directive also imposes the provisions in the relevant (national) collective agreements (*erga omnes*) on posting employers directly, and in other sectors the Member States are also entitled to cover collective agreements as binding legal sources of the posting employer's obligations. The Directive also recognises the Danish-Swedish '*erga omnes de facto*' of collective agreements (Article 3(8) PWD). The PWD in itself is a compromise combining the promotion of free movement of services (by establishing a level playing field for it) and the rights of workers, as the fifth Recital of its Preamble demonstrates.

What can be said about the EU's posting regime, i.e., the PWD in the framework of the Treaty, in an *ordre communautaire social* sense?

First, the regime combines the PWD with a seminal interpretation of the EC Treaty by the Court (establishing the extension right), the PWD then turning the extension right of the Member States into their obligation. It is also reasonably settled as to working

¹⁶⁷ Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral v EVI* [1982] ECR 223, paragraph 14; see section 1.2.2 of the second publication.

¹⁶⁸ Joined cases C-369/96 and 376/96 *Arblade* [1998] ECR I-8453. The *Arblade* test is in paragraphs 33 to 36 and the extension right in paragraph 41.

¹⁶⁹ See section II.2.3 of the first publication.

¹⁷⁰ Proportionality in practice works as a safety valve against social protectionism that has no restrictive substance in 'normal' cases because protection of workers is its yardstick. See especially the analysis of case C-341/02 *Commission v Germany* [2005] ECR I-2733 in section 3.3.3, p. 65, of the second publication. That case also confirmed that the proportionality assessment covers the extension of national minimum wages to posted workers (paragraph 24). Case C-164/99 *Portugaia* [2002] ECR I-787, paragraph 24, already expressed the same.

conditions enumerated in Article 3(1) PWD.¹⁷¹ Regarding working conditions not enumerated in Article 3(1) PWD, the Member States may impose national rules of a public policy nature (Article 3(10) PWD) based on the fact that the PWD is a minimum directive (Article 3(7) PWD) while always respecting the Arblade test on overriding reasons of general interest as well.¹⁷² The essential concept in that test is protection of workers (Arblade, paragraph 36) that justifies restrictions on freedom to provide services as an overriding reason/requirement of general interest. Protection of workers can also be found applicable regarding other market freedoms (free movement of workers, goods and capital and right of establishment whose convergence with the freedom to provide services is notorious on this conceptual level)¹⁷³ and competition rules for valid reasons, thus limiting market freedom. Protection of workers can therefore be said to represent a concept stemming from the heart of EU law (the internal market), more precisely from the interaction between the economic and social factors in the application of the market rules, which, however, belongs firmly to *ordre communautaire social*.

Second, the posting regime ‘works’ within and *regulates* the free provision of services, a fundamental freedom on the internal market, in a very specific way. I would say that ‘social’ even regulates ‘economic’ to some degree, although the PWD also has the capacity to press the actual wages of ‘host state’ workers downwards by the influx of posted workers with minimum wages (while not below the minimum; in this sense, economic considerations still regulate or, more appropriately put, affect social considerations). As we learn, in addition to *Seco*, especially from *Wolff & Müller*, prevention of social dumping is recognised as a potential overriding reason capable of restricting the free provision of services.¹⁷⁴

Third, the posting regime does not reflect the supremacy of the economic (free market) values but rather sets up a balance between the economic (free market) and social values by imposing compliance with the host state’s minimum pay and other basic

¹⁷¹ As to extreme pay provisions obviously not fully settled by the directive and its reading under the public interest doctrine (the Arblade test), see the question of a paid 50th anniversary under the host state rules (if not paid under the home state rules) in footnote 146, *supra*.

¹⁷² Dismissal and lay-off rules are an example of this type of regulation. They may also imply direct cost factors capable of distorting competition. Delicate situations may arise in the use of the right to strike by the posted workers. The PWD does not affect the strike rules of the Member States, given Recital 22 of its Preamble. Normally, strike rules are of matters of national public policy, which hints at the interpretation that a host state may impose its strike rules on posted workers. However, it is questionable whether the host state may reduce the right to strike guaranteed by the home state. While this reasoning is so far only of academic interest (the strikes concerned have not led to litigation at the European level and such litigation is also obviously rare nationally), I pass over any detailed reasoning on this matter. The issue is also linked to the concept of the ILO right to strike as a minimum binding in the EU (as supported by the EU Charter of Fundamental Rights); see chapter IV of the second publication and section 2.5, *infra*.

¹⁷³ Analogical interpretation of the market freedoms is salient for instance in case C-36/02 *Omega Spielhallen* [2004] ECR I-9609, paragraphs 30, 35 and 36.

¹⁷⁴ See case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 41. The judgment used the neutral formula of ‘unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay’.

working conditions.¹⁷⁵ The PWD is a measure for market consolidation combining social and economic reasons. Thus, a special EU characteristic is that this regime represents both a social policy measure and a competition regulator that found its 'legal home' in the framework of 'the free provision of services.

Fourth, in the construction sector, the EU regime operates with national collective agreements that are the most typical feature of the European social model.

For these reasons it is certainly justified to see the EU's posting regime (the Treaty interpretations and the PWD) as an elementary reflection of *ordre communautaire social*, being in reality a tailor-made and internal-market-bound regime.¹⁷⁶ It also absolutely reflects the principle that 'labour is not a commodity', which in the case of workers posted from the new Member States to an old Member State may mean a wage treble or even quadruple that earned in the home state. Had the Court in *Seco* confirmed the Advocate General's view on compulsory tolerance of low-wage competition from other Member States, one could describe this as reflecting the hypothetical principle that 'labour is (only) a commodity', subject like goods to free export and import in principle, one might add. Accepting the Advocate General's view in *Seco* would have legitimated and initiated a drastic race to the bottom in posting situations with an obvious spill-over effect on other areas of EC law. Reversing the effect of such a judgment in *Seco* would have obviously required an amendment of the EC Treaty, perhaps unachievable.

However, the developments in the posting field continue in the form of the pending *Rüffert* case.¹⁷⁷ Elementary comments suffice here. The national court

¹⁷⁵ Bruno de Witte has written that 'the enactment of this Directive was a politically and legally controversial use of internal market competences to favour social policy ends.' I disagree somewhat because de Witte's contention loses the economic, i.e., the competition regulating incentive on the side of the employers, which pushed the organised employers (especially the FIEC, the European Construction Industry Federation) to support the Directive. However, de Witte also asserts that, the Directive can be seen as a contribution to the protection of the fundamental social rights of workers; see Bruno de Witte, *The Trajectory of Fundamental Social Rights in the EU*, in de Búrca et al. (eds.), *Social Rights in Europe*, OUP 2005, pp. 164-165. The contention on protection of host state workers' fundamental rights is easy to share because the Directive de facto protects the nation-wide collective agreements of the host state, the collective agreements (in the construction sector) stemming from the use of freedom of association, the right to collective bargaining and sometimes also from the right to collective action.

¹⁷⁶ The PWD has a model in the ILO's Labour Clauses (Public Contracts) Convention, 1949 (convention No. 94). It requires compliance with the relevant collective agreements and legislation (Article 2) in public works and performance or supply of services, as to wages, hours of work and other conditions of labour. Ten EU Member States have ratified it.

¹⁷⁷ Case C-346/06 *Rüffert v Land Niedersachsen (Lower Saxony)*; Rechtsanwalt Dr. Rüffert acts as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG. The decision of the referring court does not reveal the extent to which the Polish workers in the bricklaying works concerned fall under the proper collective agreement (wage groups 2a to 6) or the minimum wage regulation (the Arbeitnehmerentendegesetz –AEntG implementing the PWD, thus wage groups 1 and 2). In any case the decision reveals that the Polish subcontractor had paid its workers 46.57% of the minimum wages under the AEntG. Hence, the case concerns social dumping. In a recent judgment (18.7.2007) in case C-490/04 *Commission v Germany*, nyr, the ECJ (contrary to the AG) found that Germany has not infringed Article 49 EC (instead of the

(Oberlandesgericht Celle, Germany) asks whether it is compatible with Article 49 EC to require compliance with the collective agreement in force in a public procurement contract by virtue of a German state law (Lower Saxony), instead of the lower minimum wages set up by the national law primarily implementing the PWD. In the grounds of the reference question the national court inter alia adheres to a position (a majority in the German doctrine, writes the court) that such compliance exceeds what is required by the protection of workers and prevents employers from another Member States from benefiting from their cost advantage by lower wages. There is, indeed, a considerable cost advantage if German employers have to comply with the collective agreement while the foreign employers, applying the philosophy of the national court, were able to operate with 20 to 50% lower wage costs. It is striking that the national court in its reference decision does not discuss the PWD at all. It is a minimum directive that certainly legitimizes compliance with the whole wage scale of the collective agreement concerned.¹⁷⁸ Besides, such implementation of the PWD is in a clear majority among at least the 'old' Member States (the UK applies purely statutory minimum wages instead of collective agreements). As to the cost advantage, it seems apparent that the national court has not read paragraph 41 of *Wolff&Müller* where the ECJ referred to wages lower than the host state minimum (the national court selectively refers to *Wolff&Müller* down to paragraph 35),¹⁷⁹ let alone compared the opinion of the Advocate General and the judgment in *Seco*.¹⁸⁰ However, there is hardly serious doubt about the outcome in this case. Continuing settled case-law (normally also with recourse to the Directive) seems to legitimate the Lower Saxony procurement law. In his recent opinion, AG Bot adheres to this position, relying essentially on the minimum nature of the PWD (Article 3(7), first subparagraph) and to a classic analysis under what I have called the Arblade test. Under Article 49 EC, proportionate restrictions on freedom to provide services like wages higher than the

PWD) by inter alia requiring a foreign construction employer posting workers into Germany to discharge the holiday pay via the German Social Fund of the sector (SOKA-BAU) unless there is a corresponding fund in the home state (paragraphs 45 to 55). The payment requirement via a social fund is covered by Declaration No. 7 attached to the PWD (see, e.g., the Council document 10048/96 for the Council meeting of 24.9.1996 'Statements for entry in the Council minutes', Addendum 1 (SOC264, CODEC 550)). Thus, while the PWD at this point elaborates Article 49 EC, it would have been a legitimate expectation that the infringement claim would have been assessed (i.e., dismissed) on the basis of the PWD and the Declaration. The reason for assessing the holiday pay scheme under Article 49 EC was that the PWD does not harmonise the payment rules concerned (paragraph 19). The necessary conclusion (deviating from the purpose of the PWD and leaving aside the Declarations) seems to be that issues not expressly mentioned by the PWD are scrutinised under Article 49. In *Commission v Germany*, the ECJ also accepted the German requirement to have the basic working documents translated into German (paragraphs 63 to 80).

¹⁷⁸ See also the 12th recital of the preamble to the Directive and Article 3(1), second subparagraph, which leaves the definition of the minimum wages concerned to the Member States. Another issue is that Germany in its national law (the *Arbeitnehmerentsendegesetz*) primarily implementing the PWD has recourse only to wages lower than those in the collective agreement for the construction sector, or is limited to the two lowest wage categories, whereas they are seven in all in the collective agreement concerned; see section 3.3.1 of the second publication. The public procurement laws de facto also implement the PWD, corresponding better to its spirit than the AentG as well.

¹⁷⁹ See above, at footnote 174, *supra*.

¹⁸⁰ See above, at footnote 167, *supra*, and section 1.2.2, at footnote 14, of the second publication.

national ‘minimum of minima’ fixed by law or collective agreements, are justified where they significantly augment the benefits of the posted workers and, in public procurement, meet the requirements of transparency.¹⁸¹

One principal aspect remains in posting of workers. In the second publication I left it open whether the trade union organisations of the host state may resort to collective action in order to claim a market wage payable to the posted workers.¹⁸² By market wage I mean one that, depending on historical, sociological and political factors, availability of manpower, economic trends, geographic circumstances, etc., is higher than that in the law or national collective agreement concerned. In the second publication I initially referred to Articles 2 (including ‘a harmonious, balanced and sustainable development of economic activities’ and ‘the raising of the standard of living’), 3, 4, 12, 50(3) and 136 EC (improved working conditions and upward harmonisation), as well as Article 6(1) EU as strongly suggesting that the EU law does not outlaw a claim based on market wages.¹⁸³ A couple of additional remarks can also be made. First, the minimum nature of the PWD, a political confirmation of the European legislator to the Treaty-based case-law of the Court, also supports this outcome. Second, if the market wage can be legally claimed against a non-organised domestic employer¹⁸⁴ (as is the case in a Swedish or Finnish context, for instance) then the application of the non-discrimination principle (Articles 12 and 50(3) EC) to a non-organised foreign service-provider doubtlessly leads to the same. Third, in applying the principle of the open market economy (Article 4 EC),¹⁸⁵ one may ask whether a ‘market action’ would be allowed only for the companies and corresponding economic actors; there is no real legal reason to deny this right regarding workers and their organisations as ‘market actors’ and thus to restrict a fundamental right. In sum: the claim on a market wage obviously enjoys protection under EU law.

In the light of *ordre communautaire social* it is easy to see that the interpretation suggested above in the market wage issue represents upward harmonisation and improved working conditions (within the limits of protection of workers) and the use of the fundamental right to collective action, and respects the principle of non-discrimination. The other way round, EU law will not protect an employer’s

¹⁸¹ See the opinion of 20 September 2007. The only prominent statement requiring comment in the opinion is that indicating the sector-wide collective agreement in force between organised management and labour as a ‘specific’ agreement in relation to the *erga omnes* agreement on minimum wages (‘TV Mindestlohn’); paragraphs 26 to 28. It is equally possible to see the ‘TV Mindestlohn’ as ‘specific’ in relation to the agreement between organised management and labour.

¹⁸² Time and space do not allow redeeming the promise made in the second publication to come up with profound reasoning on this issue in this synthesis article. However, the issue no longer seems to necessitate such treatment.

¹⁸³ See section 4.10.4, pp. 124-125.

¹⁸⁴ I mean an employer that does not belong to a host state’s employer organisation that is party to the (sectoral) collective agreement concerned.

¹⁸⁵ A clarification has to be made. In the first publication I noted that there is, so far as I know, no case connecting Article 4 EC to the ‘leading Articles’ (2 and 3) of the Treaty. However, the Court has resorted to Article 4 EC so as to reinforce a competition argument at least in case C-198/01 *Fiammiferi* [2003] ECR I-8055, paragraph 47. The case concerned the national competition authority’s power and duty to declare national anti-competitive legislation inapplicable.

behaviour in exercising market freedom in a way that cuts the working conditions of posted workers to a level below the standards of the host state. The market wage claim fits into *ordre communautaire social* well, as does the fight against social dumping via the principle of improved working conditions.

2.5 The Right to Collective Action. International Law Argument

As the first direct strike (collective action) cases (*Laval*, and *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v. Viking*) are pending for a preliminary ruling as this study is being written,¹⁸⁶ the European Court of Justice faces a great challenge in applying and protecting the fundamental right to strike/industrial action in the context of the free provision of services.¹⁸⁷ The *Laval* case further deals with the position of the Danish-Swedish labour market model, crucially based on collective agreements, within the Community where it deserves its place.

To begin with, there are strong arguments in case-law in favour of the solution that the Court would initially reconfirm the horizontal direct effect of Article 49 EC in *Laval*, hence finding that the action concerned was directed to collective regulation of gainful employment.¹⁸⁸ The 'old' Member States and trade unions taking part in the *Laval* and *Viking* cases have denied such an outcome regarding both Article 43 and 49 EC, mainly because of the lack of any regulatory effect by the collective action. Some of the 'new' Member States as well as Viking Line have referred to the formula used in *Bosman* and *Wouters*: 'freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law'¹⁸⁹ (emphasis added) in the *Viking* hearing as an additional ground.

In the second publication, I held that 'collective regulation of gainful employment' (the formula for the scope of Article 49 used since *Walrave*)¹⁹⁰ also covers a collective action targeted at the conclusion of a collective agreement because the reverse position would artificially detach such action from its purpose (a collective

¹⁸⁶ In *Laval* the actual dispute and collective action concerns pay applicable in a classic posting situation. At issue in *Viking* is pay after re-flagging a ship in another Member State and replacement of the present crew with a new one paid about a quarter of the previous wages, subject to a threat by the FSU (as supported by the ITF) of a future collective action that Viking tries to prevent by a British type injunction under Articles 43 and 49 EC, as well as by virtue of Regulation 4055/86 on Maritime Transport Services.

¹⁸⁷ The more appropriate legal framework in *Viking* seems to be free provision of services. See footnote 322 of the second publication and footnote 291, *infra*, on the 'rivalling' or overlapping internal market freedoms. Another aspect is that the issue is not a genuine free movement case because Viking Line would continue the same route and just replace the crew on board MS Rosella with a cheaper one.

¹⁸⁸ See the discussion in the second publication, section 4.2. See also the position of AG Mengozzi in *Laval* in section 3.3, *infra*, supporting the horizontal direct effect.

¹⁸⁹ See Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 83, and Case C-309/99 *Wouters* ECR [2002] I-1577, paragraph 120.

¹⁹⁰ Case 36/74 *Walrave* [1974] ECR 1405, paragraph 17.

agreement in these cases), which is an elementary aspect in discussing the limits of the right to such action. The *Bosman* and *Wouters* formula simply makes this clearer, because a collective action by the trade union as a quasi-public body under Finnish law is an exercise of their legal autonomy. Regarding Regulation 4055/86, the horizontal direct effect is by definition clear. It is however crucial for both Article 49 EC and Regulation 4055/86 that they have never been adopted with an eye to restricting a collective action and that they cannot boldly trump the nationally and internationally guaranteed right to such action (Swedish law in *Laval*, Finnish law in *Viking*). Horizontal direct effect in itself does not settle the priority between or balancing of the market freedom and the fundamental right concerned, granting only a *prima facie* right to invoke a provision of EU law.¹⁹¹ Horizontal direct effect cannot alter the substance of the EU norm having such an effect. Thus, a real debate on any trumping effect, e.g., regarding Regulation 4055/86, becomes actual only in the wholly exceptional case that a trade union genuinely strives to prevent the ship-owner for good from using his right to free traffic through its collective action. This is what the FSU forcefully denies, a habitual strike action being at issue. One finally has also to refer to the 'last line of defence' by the ITF and the FSU against the horizontal direct effect of Articles 43 and 49 EC; namely, despite the differences in the details of the regulatory power (autonomy) attributed to the social partners in the Member States to settle employment (and job security) conditions by binding collective agreements, such a power still exists in the Member States. According to the ITF and FSU, it would be absurd to let the market freedoms (and the courts) penetrate into this traditional sphere of autonomy of the social partners, also recognised indirectly by Articles 138 and 139 EC, as a legal superpower. Needless to say, contesting the horizontal direct effect of Article 49 EC is line with purely *ordre communautaire social* thinking while not its indispensable element.

However, the clash between the right to collective action and the market freedom to provide services in the internal market in *Laval* and *Viking* cases is a monumental legal discourse on the effect of the market freedoms on the fundamental right to collective action and even on a weighing of social values. Its fundamental rights aspects I have commented on in section 1.4.4, *supra*. In *Laval*, the legal discourse may lead to combined reasoning on the doctrines of fundamental rights and acceptable restrictions of free provision of services, strongly resembling *Albany* in its outcome. In *Viking* the FSU has asserted (along the lines in the submission of the ITF), by analogy with the Court's reasoning on the social policy objectives present in paragraph 59 of *Albany*¹⁹² that

it therefore follows from an effective and consistent interpretation of the provisions of Community law as a whole and the fundamental right to take collective action in accordance with the ILO Conventions Nos. 87 and 98 that collective action in pursuit of such objectives must, by virtue of its nature and

¹⁹¹ This is the lesson from case C-112/00 *Schmidberger* [2003] ECR I-5659 especially.

¹⁹² Case C-67/96 *Albany International* [1999] ECR I-5751. On *Albany*, see the first chapter of the third publication and section II.2.6 of the first publication. The first reference question in *Viking* asked whether industrial action falls 'outside the scope of Article 43 of the EC Treaty and/or Regulation 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in ... *Albany*, paras 52-64?'

purpose, be regarded as falling outside the scope of Article 43 EC Treaty and Regulation 4055/86 (or Article 49 EC Treaty).¹⁹³

This assertion was complemented by the ‘nature and purpose’ conditions that the collective action ‘is genuine and pursues the improvement of working conditions in a general sense’.¹⁹⁴ Self-evidently, the present author shares both assertions of the FSU. However, it remains to be seen whether the Court will resort to the *Albany* analogy or to the balancing between market freedoms and fundamental social right present in *Schmidberger*. In any case, the difference between *Laval* and *Viking* and *Schmidberger* is that the latter dealt with a classical conflict of rights whereas the former essentially involves a conflict of interest in which the courts can intervene only extremely exceptionally. I freely acknowledge that this idea imposes rethinking the line of argument present in the second publication, section 4.9.1, to a certain extent. Thus, resorting to the *Albany* analogy seems even more justified than what I wrote there (and in section 4.10.4).

In discussing the lot of the right to collective action in cases like *Laval* and *Viking*, one has to go back to the basics. Thus, what can be said about the right to collective action in the light of the role and interplay between the economic and social factors in the EU? In these cases, its ‘economic’ and ‘social constitutions’ are on the table of the ECJ. This constitutional level first requires recapitulation of the fact that in founding the Community and adopting the Treaty of Rome, strike rules were not meant to be covered either by the market freedoms or by Community law in general. The Community was the European Economic Community, which essentially included only free movement rights of workers from the social dimension, not their and their organisations’ rights (or duties) otherwise. This state of things was in a way reconfirmed by Article 2(6) of the Maastricht Social Policy Agreement (three years after the 1989 Community Charter of Fundamental Social Rights of Workers), then enshrined in the EC Treaty as Article 137(5) EC by the Treaty of Amsterdam. Naturally, since the Treaty structure in principle included a ‘risk’ or opportunity for a legal clash between the right to collective action and the market freedoms from the outset, the history that witnesses the lack of any genuine ‘strike v. market freedom’ case in the ECJ until *Laval* and *Viking* is salient. The legal framework for these economic freedoms, i.e., the material legal content of the market freedoms has not changed paradigmatically during this history, but have been completed and refined. Mainly via the fundamental rights angle, the social factor has emerged and grown, being subject to judgments in these cases in its further development. It is very much akin to the relationship between collective agreements and competition rules, as we learn from *Albany*. On the other hand, it would not be sustainable doctrine to try to protect the national and ILO-based right to strike by escaping under national law and

¹⁹³ The FSU’s submission, paragraph 3.27, made public here with the permission of the FSU. Regulation 4055/86, renders the Treaty rules on free provision of services (like Article 49 EC) applicable to the maritime transport sector. On this, see footnote 318 of the second publication. The *Laval* and *Viking* cases are not the first ones concealing the ILO Convention No. 87; see footnote 43, *supra* (however, the judgments concerned did not refer to Convention No. 87).

¹⁹⁴ *Ibid.*, paragraph 3.28. The FSU continues by asserting how ‘[i]n the present case there are no grounds for concluding that the hypothetical collective action Viking seeks to prevent would pursue anything other than legitimate objectives’; paragraph 3.29.

claiming the non-competence of the EU in this matter.¹⁹⁵ In all likelihood the cost gap in the enlarged internal market will produce more conflicts involving the interpretation and application of the EC law on market freedoms and labour/social law. This cost gap (roughly one to three or even four) is the ultimate driving force for the events in both *Laval* and *Viking*. This shows the capacity of the changes in the economic basis (radical deepening of the cost gap in the internal market in 2004, as demonstrated by the accession of Bulgaria and Romania in 2007) to generate or produce alleged consequences in law.

Thus, the *Laval* and *Viking* cases show how these essentially economic conflicts may also dress themselves in a legal form under EU law by the initiatives of the employer side, imposing a decision by the ECJ because the European legislator has first omitted the issue (until 1992) and then declared itself unwilling to resolve the problem with a directive (Article 137(5) EC); i.e., building up a coherent European industrial relations model or at least its basis in addition to the European social dialogue.

The events in *Viking* in particular also reveal the basic concepts of the role of collective action in the internal market. It also deals with the interplay of economic and social factors, as well as with the concept of the market. Unlike the *Viking* company, the ITF/FSU have asserted that by invoking the exclusion of collective action and bargaining from the ambit of Title III of the Treaty, they reject any assumption that the right to strike in connection with collective bargaining contradicts the functioning of the internal market. Rather, they maintain that collective action and collective bargaining positively promote market integration. The rationale for free movement is market integration and the rationale for the EU's social policy is to promote both improved working and living conditions and proper social protection. Finally, market efficiency requires collective action by workers and trade unions to ensure their voice is heard and their interests are taken account of. The ITF/FSU finds support for this interpretation from Maduro, who has stated (before becoming Advocate General) how the '...rights of participation and representation such as the freedom of association, the right to collective bargaining, and the right to collective action should be considered as instrumental to a fully functioning integrated market which can increase efficiency and wealth maximization.'¹⁹⁶

No doubt the confrontation between market freedoms and labour rights outside the scope of purely domestic matters will also expose national collective labour law, strike rules included, to a so far obviously unexpected fundamental rights scrutiny under EU law. The prohibition of sympathy action in UK law and its excessive restrictions in German law are obvious examples of this, owing to the protection for sympathy action in the ILO (and Council of Europe) practice.¹⁹⁷ Such actions are also

¹⁹⁵ See section 4.3 of the second publication.

¹⁹⁶ Miguel Poiates Maduro, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, in Alston (ed.), *The EU and Human Rights*, OUP 1999, p. 470.

¹⁹⁷ For the prohibition of sympathy (or secondary) action in UK law, see Section 224 of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) of 1992. Only peaceful picketing around the work-place concerned is permitted. The withdrawal of civil law immunity for secondary action applies even when the employers have parallel shareholdings; see Simon Deakin and Gillian S. Morris, *Labour Law*, Butterworths 1998, p. 900f. Their conclusion is straightforward: '[t]his means that the scope of lawful industrial action is

normally illegal in Austria and Spain, while they are permitted in Italy and Greece, as well as being privileged in Sweden and Finland according to Robert Rebhahn.¹⁹⁸

I move on to consider once again the effect of international labour law commitments in the EU via a glimpse at fundamental rights in *Laval* and *Viking*.

Thus, the value and impact of fundamental rights is paramount in the pending *Laval* and *Viking* cases. I recall that in the second publication I have described the right to collective action on the basis of the *Laval* case, as reflected in the ILO's Constitution, Freedom of Association and Protection of the Right to Organise Convention 1948, the Right to Organise and Collective Bargaining Convention 1949, the ILO Declaration on Fundamental Principles and Rights at Work 1998, the European Convention on Human Rights and Fundamental Freedoms 1951, the European Social Charter 1961, the UN's International Covenant on Economic, Social and Cultural Rights 1966, the Community Charter of Fundamental Social Rights of Workers 1989, the Charter of

defined entirely by the legal scope of the employment unit.' On the ban on secondary action in UK law, see also footnote 226, *infra*.

As to Germany, the strict legality assessment of a secondary action is based on case-law; the landmark decision was handed down by the Federal labour Court in 1985 as an interpretation of freedom of association enshrined in Article 9 of the Constitution (BAG 1985, AP Nr. 85 zu Art. 9 GG Arbeitskampf). The essential ground for exceptionally allowing a secondary action is that the employer is not neutral in relation to the primary conflict. The employer normally loses his neutrality in the case of groups of companies, or due to a close sub-contracting relationship with the target employer of the primary conflict; see, e.g., Wolfgang Däubler, *Arbeitsrecht* 1, Rowohlt 2006, p. 423-4. Weiss has additionally noted that for the legality of a solidarity action the employer subject to a solidarity strike should have taken over the production or that the two employers should form one entity economically speaking. For Weiss these examples, endorsed by the *Bundesarbeitsgericht*, 'clearly show that solidarity strikes are practically impossible.' Far-sightedly, he also claimed that 'the scope of the exceptional cases is much too narrow to allow solidarity strikes to become a relevant feature of industrial conflict'; Manfred Weiss, Federal Republic of Germany, in *International Encyclopaedia for Labour Law and Industrial Relations*. Kluwer Law, 1994, paragraph 410. In the Council of Europe, the Committee of Ministers issued the Recommendation R ChS (98) 2 to Germany based on Article 6(4) of the European Social Charter (on the Charter, see section 4.4.4 of the second publication) in 1998, given that the written German law allows only strikes aimed at concluding a collective agreement. In its conclusion of 30.9.2004, the European Committee for Social Rights (the present supervisory body of the ESC) recalled the Recommendation and highlighted the binding nature of the Charter obligations in strict terms (ECSR Conclusions XVII-1, p. 204; available via www.coe.int). This state of affairs, together with a corresponding situation regarding the ILO and ESC criticism of the UK, shows the weak nature (lack of real enforcement, thus other than statements on infringements and exclusion from the ILO) of the ILO provisions and the ESC. A correspondingly indifferent attitude by a Member State vis-à-vis a judgment of the ECJ is hardly imaginable.

¹⁹⁸ See Robert Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective* (Part II), IJLLIR Vol. 20/1, 2004, p. 112. It is appropriate to elaborate the situation in Finland when a collective agreement is in force by noting that a secondary action can exceptionally be regarded as leading to a situation where this agreement essentially loses its role as a guarantor of industrial peace, making the sympathy action illegal (see, e.g., the judgment of the Labour Court of Finland, TT:1997-11). For a detailed discussion, see Juri Aaltonen, *International Secondary Industrial Action in the EU Member States*, Finnish Metalworkers' Union 1999, pp. 28-47.

Fundamental Rights of the European Union 2000, and the Member States' constitutions.¹⁹⁹ All the EU Member States have ratified the international instruments concerned, with some relevant reservations regarding the European Social Charter.²⁰⁰ Protection of the right to collective action is ultimately tied to liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, the founding principles of the Union (Article 6(1) EU). However, the conclusion that the EU itself has to respect the ILO provisions (Constitution and Conventions 87 and 98) as the commitments of all the EU Member States, as to the right to strike, either as prior international agreements under Article 307, first paragraph, EC or finally by virtue of general international law is essential in the analysis of chapter IV of the second publication.²⁰¹ Hence, the EU has to respect also the protection granted to sympathy actions in the ILO's monitoring practice.²⁰² To ease the pain of repetition, I call this respect the international law argument below.

The author's analysis of the *Laval* and *Viking* cases thus essentially relies upon the international law argument. As far as I can see, among scholars only Professor Ronnie Eklund has so far publicly adhered to this thesis in the context of *Laval* and *Viking*,²⁰³ which will also normally raise objections in the doctrine, Member States and on the employer side. But we are not that lonely. Professor Olivier De Schutter, as the coordinator of the EU Network of Independent Experts on Fundamental Rights, highlighted the prior international fundamental rights obligations of the Member States within the UN, Council of Europe and ILO (counting 19 human rights treaties in all) in the Network's first annual report (of 2002) and remarked their binding status under Article 307 EC, first paragraph, and 'general public international law'. As an anchor he also referred to the rule that a State cannot free itself from prior international obligations by concluding a later treaty with other States (Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969). Reading the EU Charter in the light of international and European human rights law, De Schutter found simply objective, which avoids the institutions of the EU or Member States being surprised by the interpretation given to them.²⁰⁴

¹⁹⁹ See sections 4.4.2 to 4.4.7 of the second publication.

²⁰⁰ See footnote 224 in the second publication

²⁰¹ See sections 4.5 to 4.7 of the second publication. I repeat that the ECJ has confirmed the binding effect of general international law, especially in plenary cases *Poulsen* and *Racke* (footnote 107, *supra*).

²⁰² At present, the essence of the ILO right to collective action can be found in the recent publication Freedom of association; Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th (revised) edition, International Labour Office Geneva 2006; available via <http://www.ilo.org/ilolex/english/23e2006.pdf>. The importance of the right to strike and its legitimate exercise, with the previous essential content (see footnotes 213 to 218 of the second publication), are dealt with in paragraphs 520 to 525. The right to call a sympathy strike is with previous contents in paragraphs 534 and 538: the former states that workers should have that right if the primary action is lawful; the latter notes that '[a] ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association.'

²⁰³ Ronnie Eklund, The *Laval* Case, ILJ Vol. 35, No. 2, June 2006, p. 207.

²⁰⁴ Olivier De Schutter, Introduction, in EU Network of Independent Experts on Fundamental Rights, Report on the Situation of Human Rights in the European Union and Its Member States in 2002, European Commission 2003, pp. 21-23; http://ec.europa.eu/justice_home/cfr_cdf/doc/rapport_2002_en.pdf. The 2003 report (this time with the authority of the whole network) stated how Article 307 EC means 'even a legal

However, the author sees the international law argument as an example of natural evolution generated by a new event in EU law, although equally natural within economic activities, i.e., a collective action. If there is anything surprising in this argument, it is ultimately the simplicity of the legal solution or (double) formula by which the commitments of all the EU Member States within the ILO should be respected in EU law. Only the *Laval* case imposed thorough reasoning and led to the (double) argument. Furthermore, the status of the Court as the guardian of the rule of law leads us to presume that the argument will also be taken seriously in this context, although the ECJ may also have the chance to settle the issue by simply declaring the ILO provisions a source of inspiration for its fundamental rights reasoning. Accordingly, the binding effect of general international law in EU law also reflects an irrevocable evolution in EU law, given the role of the EU in the modern world. Besides, there is the strong moral argument that what the EU promotes and rewards externally it must also respect internally. Hence, it is not surprising that, according to the explanations of the Praesidium, the Convention drafting the EU Charter of Fundamental Rights did not base its Article 28 on the ILO right to collective action. There was hardly adequate debate in the Convention on this subject (i.e., the ILO connection). The same concerns the Convention that drafted the Constitutional Treaty. On the other hand, the Preamble to the Charter and its Article 53 recognise the international obligations of the Member States. Thus later I will not call the ‘international law argument’ into question. This should be as natural as the significance of the European Human Rights Convention that binds every Member State as their international obligation, and thereby the EU as well.

I am well aware of the possible arguments diminishing or mitigating the effect of the ILO right to industrial action by referring to the argument that the references in Article 136 EC make the European Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers part of the *acquis*, and there is moreover the EU Charter of Fundamental Rights, a recognised source of EU law since *Parliament v Council* of 27.6.2006. In both dimensions the recourse to the ILO right may even be superfluous. There are several counter-arguments to this. The first is that Article 136 EC refers to the Charters as something to be had in mind, not that they bind as parts of the *acquis*, although there is good reason to argue that the reference in Article 136 EC draws the two Charters into the ambit of the *acquis*. As to the ILO provisions, the EU promotes and rewards compliance with the rights covered by the 1998 ILO Declaration as absolutely a part of the *acquis* in its external relations (e.g., in Regulation 980/05/EC on the Generalised System of (Trade) Preferences) and development aid,²⁰⁵ and it is simply natural and moral for the EU to respect the same rights internally. The second counter-argument is that Austria, Greece, Luxembourg and Poland have not ratified Article 6(4) ESC. The third is that the ILO right to industrial action indeed also covers a sympathy action, which does not mean to deny the value of the negative conclusions of the European Committee of Social Rights in

obligation for the institutions acting in the framework of the EC Treaty, at least as long as there remains an incompatibility between the international undertakings accepted by the Member State before its accession to the Union and the obligations imposed by the Union.’ (see http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2003_en.pdf, p. 21).

²⁰⁵ It is no longer Regulation 2501/01/EC as I indicated in footnote 220 of the second publication. However, its substance has not been changed. In the field of EU development aid, the 2000 Cotonou Agreement includes the commitment to the core labour standards as defined by the ILO (Article 50); http://ec.europa.eu/development/ICenter/Pdf/agr01_en.pdf.

the cases of the UK and Germany, concerning the conformity of their national rules with Article 6(4) ESC.²⁰⁶ The fourth one is that the ECtHR has not unequivocally recognised the right to strike under Article 11 ECHR (although it has recognised it as one of the most important means for the protection of occupational interests)²⁰⁷ which also to a certain extent shadows the effect of Article 6(4) ESC. The fifth is that the ILO right to collective action is not subject to restrictions ‘necessary in a democratic society for the protection of the rights and freedoms of others’²⁰⁸, unlike the ESC, while the ILO right is subject only to limitations regarding armed forces and the police,²⁰⁹ essential services²¹⁰ and exceptional circumstances in society.²¹¹ The sixth counter-argument is that the ILO right is free from the possible diluting effect of references to national law that are included in point 13 of the 1989 Community Charter of Fundamental Social Rights and in Article 28 of the EU Charter. Finally, the ILO right is free from the constraint that the EU Charter according to its letter in Article 51(1) is addressed to the Member States only when implementing Community law,²¹² as well as being free from the constraints (albeit limited ones) in Article 52(1) of the EU Charter, referring to restrictions that respect the essence of the rights and freedoms concerned.

The reliance on the international law argument as a ‘protection base’ for the ILO right to collective action within the EU has also given rise to the counter-argument that it could provoke the Member States to denounce ILO Conventions No. 87 and 98, by

²⁰⁶ As to the Conclusions on the UK of the European Committee of Social Rights, see footnote 226, *infra*, and as to Germany, footnote 197, *supra*.

²⁰⁷ Case *Schmidt and Dahlström v Sweden*, ECtHR 6 February 1976, Series A no. 21, p. 16, paragraph 36. For instance, Rolf Birk has held that the ECtHR has not recognized the right to strike under Article 11 ECHR; Rolf Birk, *Arbeitskampf und Europarecht*, in Oetker et al. (Ed.), *50 Jahre Bundesarbeitsgericht*, Münchner Beck 2004, p. 1177. *Idem* (by referring to *Schmidt and Dahlström*) Bruno Veneziani, Right of collective bargaining and action, in Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos 2006, p. 323. Veneziani discusses Article 28 of the Charter extensively, including its coming into being.

²⁰⁸ See Article 31 of the European Social Charter of 1961 and Article G of the revised Social Charter of 1996.

²⁰⁹ See Article 9 of Convention No. 87.

²¹⁰ The ILO Committee of Experts for the Application of Conventions and Recommendations (CEACR) has stated that essential services should be defined restrictively: ‘the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population’; Report III (Part 4B) Freedom of association and collective bargaining (General Survey), International Labour Conference 1994, paragraph 159. The Committee further found (in paragraph 158) that the prohibition of the right to strike of public servants should be limited to those ‘exercising authority in the name of the state’, and that in borderline cases a negotiated minimum service might be the solution ‘when a total and prolonged stoppage might result in serious consequences for the public.’

²¹¹ *Ibid.*, paragraph 152, the CEACR (previous note) stated that these exceptional circumstances mean ‘genuine crisis situations, such as those arising as a result of a serious conflict, insurrection or natural disaster in which the normal conditions for the functioning of society are absent.’

²¹² Case-law requires respect for fundamental rights when a situation falls within the scope of Community law; see, e.g., case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 73 to 75.

virtue of Article 307, second paragraph, EC.²¹³ This article stipulates that to the extent that international agreements are not compatible with the Treaty, ‘the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.’ The author finds that this denunciation argument is simply not tenable because the Treaty (or secondary EC law) does not entail substantive provisions on the right to collective action. The only existing EU provisions are in the Monti-Regulation 2679/98/EC (Article 2) and Services Directive 2006/123/EC (Article 1(7)), which both mean to protect the right to collective action. Politically any denunciation of ILO Conventions Nos. 87 and 98 indeed also looks impossible, in this era of globalisation, highlighting the need to build up globally fair industrial relations, and in a situation where the EU promotes and rewards compliance with ILO Conventions 87 and 98 in external trade and development aid as a part of the *acquis*. Furthermore, as paragraph 1 of the 1998 Declaration explains, the obligation to observe the core Conventions stems directly from ILO membership, i.e., from its Constitution.

There remains the question of possible protection by EU law for a transnational collective action.

The outcome that the Community has to respect the ILO right to industrial action also necessitates further comment about the lot of a parallel cross-border (sympathy) action, perhaps called by a European trade union organisation, in the spirit of *ordre communautaire social*. Is such an action protected under EU law? Answering this first necessitates a glimpse at the explanations that follow the EU Charter. Hence, the Bureau (Praesidium) of the Convention drafting the Charter of Fundamental Rights of the EU wrote in its explanations to Article 28 that ‘Collective action, including strike action, comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States’. The explanations were not intended to have any legal value,²¹⁴ while Article 52(7) of the Charter, added by the European Council in 2004, for its part states that the explanations were ‘drawn up as a way of providing guidance in the interpretation’ and that the Courts must give ‘due regard’ to the explanations.²¹⁵ The Reform Treaty will reproduce this ‘due regard’ in

²¹³ On the basis of this unofficial explanation, Finland counted the international instruments protecting the right to collective action and described them as binding in the hearing of the *Viking* case, but without a specific reference to the ILO right to collective action under Article 307 EC, first paragraph, and general international law. As to the ILO/EU position, Novitz refers in this context to the mass denunciation of the ILO Convention No. 89 by the EU Member States, as conflicting with the Equal Treatment Directive 76/207; see Novitz, *International and European Protection of the Right to Strike*, p. 254. However, her reference is linked to fears among trade unions after the ‘strawberry judgment’ (C-296/95 *Commission v. France* [1997] ECR I-6959; rendered in the context of even violent attacks against free movement of goods) that its principles would be applied to collective action as well. Such fears are in any case obsolete and, besides, legally untenable for the reasons explained in the corpus text below.

²¹⁴ See http://www.europarl.europa.eu/charter/convent49_en.htm. The Convention document *Charte 4473/00*, Convent 49 states (on the front page): ‘These explanations have been prepared at the instigation of the Praesidium. They have no legal value and are simply intended to clarify the provisions of the Charter.’ Thus, the explanations were never drafted or approved by the Convention. Neither were they published with the Charter in the OJ C364/00, 18.12.2000.

²¹⁵ The Preamble to the Charter as Part II of the failed Constitutional Treaty referred to the interpretation of the Charter with ‘due regard to the explanations.’ Bercusson has noted how

the interpretation, i.e., in the amended Article 6(1) EU, third sub-paragraph, but Article 52(7) will remain intact. How should this state of affairs be interpreted? First, until the Reform Treaty comes into force, these explanations remain of no legal value. Later they will be given ‘due regard’ only, and they are a ‘way of providing guidance’, not a priority excluding the cross-border action (normally but not necessarily a sympathy action) from the ambit of Community law, whereas it belongs there according to the wording of Article 28 of the Charter itself (‘...in accordance with Community law...’). One thus has to ask whether this also means protection for a ‘parallel’, i.e., transnational action (or, sympathy action), in several Member States.

The answer to this question is simple in principle. When the EU’s legal order is bound to respect the ILO right to collective action as a fundamental right, and this logically also applies to the ILO/EU Member States,²¹⁶ it would indeed be illogical to deny this protection in a cross-border context when that right is used in parallel in several Member States or the action is called for or supported by a transnational trade union body. The *raison d’être* of EU law is to cover the cross-border use and effect of rights in particular. The simple legal-ideological rationale is that the Europeanized (cross-border) economy must be balanced by transnational trade union rights. What could legitimize or justify such a denial in any case? Provisions and practices under national law such as the de facto prohibition of sympathy action in UK law and its excessive restriction in German law, or national case-law contrary to the fundamental right could in principle be the candidate bases for such a denial, as supported by the reference to national law and practices in Article 28 of the EU Charter and in Article 1(7) of the Services Directive as well as by Article 137(5) EC, which *allegedly* implies the principle that governing collective action is fully a matter for national law from the point of the EU law. The author does adhere to this; see below.

The references to national law and practices in the EU Charter are weak arguments because, according to Article 53, the Charter shall not restrict or adversely affect human rights as recognized by international agreements to which all the Member States are party. Furthermore, the Preamble to the Charter refers to rights as they result from the international obligations of the Member States. Thus the Charter cannot be interpreted as restricting the protection for transnational action, whether sympathy or primary action, covered by the ILO Convention No. 87. At the same time,

Article II-112(7) reduced the explanations to a mere ‘way of providing guidance in the interpretation of the Charter’ (‘will be interpreted’ in the Preamble becomes ‘shall be given due regard’ in Article II-112(7)), and how Article II-112(7) took precedence over the Preamble; see Brian Bercusson, *The EU Charter of Fundamental Rights and the Constitution of the European Union*, in Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos 2006, p. 491. On the same logic, it is arguable that Article 52(7) of the Charter takes precedence over the amended Article 6(1) EU, third subparagraph; hence, that the explanations will remain guidance only.

²¹⁶ It would be wholly illogical to assert that the ILO Member States would not be obliged by the ILO fundamental rights when acting in the EU. For the fundamental rights’ binding effect on the Member States, see case C-260/89 *ERT v. DEP* [1991] ECR I-2925, paragraph 42; case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 73 to 75, and case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 56. All these cases define the ambit of the Member States’ fundamental rights obligation as effective within the scope of Community law, thus not limited to the measures implementing EU law, although Article 51(1) of the Charter so states. See also the remarks at footnotes 310 to 312, *infra*.

Article 53 of the Charter is the final argument against the impact of the explanations of the Convention Praesidium. The non-effect of the Services Directive looks equally obvious: whereas respect for fundamental rights is a condition of the legality of Community acts,²¹⁷ the Services Directive cannot validly restrict the fundamental (ILO) right to collective action. As to the effect of Article 137(5) EC, I confine myself to repeating the interpretation that that proviso validly expresses only the reluctance of the Member States to enact on the right to strike under Article 137 EC without dealing with its substance and without making it a wholly national issue 'EU-constitutionally'; see also section 4.3 of the second publication.

In sum, it looks as if the *ordre communautaire social* thinking, highlighting a consistent interpretation of the protection for fundamental rights, would result in finding the parallel use of the right to collective action in several Member States or other cross-border collective action in principle protected in Community law. The counter-arguments pointed out in Community and national law certainly do not look too strong. In so far as they are based on national law, it is logical to find that national restrictions on the ILO right to collective action must give way under the effective protection of fundamental rights (ultimately ensured by the ECJ), which is also in conformity with primacy of EC law.

In the meantime, it is also appropriate to consider the ITF action in *Viking* as an expression of freedom of association with some complementary remarks on transnational sympathy action.

2.6 Freedom of Association; the ITF's Action

A fundamental rights exercise can also be made regarding freedom of association as present in the pending *Viking* case.²¹⁸ The injunction against the International Transport Workers' Federation (ITF) has ultimately been sought because it sent a circular to its Estonian (and other) affiliates demanding that they refrain from negotiations with the Finnish beneficial shipowner (Viking Line), although it would prevent all the ITF's own industrial actions (a boycott or any other action concerning reflagging of Rosella or wages after reflagging) and causing such action by others in this case. The Finnish Seamen's Union (FSU) therefore, following the ITF's flag of convenience policy (FOC), retained the negotiation rights.²¹⁹ Similar 'action' by the ITF is of course predictable if the envisaged action by the FSU were ever realized.

In a proper legal construction, the ITF's action (thus, especially the circular) rather falls under the freedom of association because the ITF did not present any of its own or other supportive claims to Viking Line followed by a threatened withdrawal of labour or other collective action by the ITF. In this respect the question arises about

²¹⁷ See Opinion 2/94 [1996] ECR I-1759, paragraph 34, and Case C-249/96 *Grant* [1998] ECR I-621, paragraph 45.

²¹⁸ See also footnotes 27, 154, 186 and 187, *supra*. I recall that in case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 79, the ECJ confirmed that freedom of association is a fundamental right in Community law.

²¹⁹ See paragraph 24 vi) in the Court of Appeal's decision, which is available on the internet: <<http://www.bailii.org/ew/cases/EWCA/Civ/2005/1299.html>>.

the legal situation, i.e., the relationship between freedom of association and the economic rights (free provision of services) of the shipowner.

The EU has its own clauses on freedom of association in the 1989 Community Charter (Article 11) and the EU Charter of Fundamental Rights (Article 12). The ILO Convention No. 87 guarantees that freedom both generally (Article 2) and so far as it covers international workers organizations (Article 5).²²⁰ The European Social Charter (Article 5) and the UN Covenants (Article 8 of the International Covenant on Economic, Social and Cultural Rights that also mentions international trade union organizations; Article 22 in the Covenant on Civil and Political Rights) include it²²¹ as the constitutions of the Member States generally do as well. Furthermore, Article 11 ECHR enshrines it. The international law argument (see section 2.5, *supra*) applies to freedom of association as well. The outcome should be that an activity falling under freedom of association does not, by its nature (peaceful and genuine) and purpose (improved working conditions), fall under the provisions on free provision of services (or freedom of establishment). This would be an interpretation analogical to *Albany*.²²² The Arblade-Schmidberger model, perhaps more likely to be applied for doctrinal reasons,²²³ may lead in practice to the same outcome that measures under freedom of association intended to protect workers by improving their working conditions arguably pass the proportionality test inherent in this model successfully.²²⁴ There is nothing in *Viking* showing that the FSU pay claim exceeds the limits of an ordinary wage in this area.

If, in the alternative, the ITF circular (in fact, the FOC policy) is in any case also regarded as a transnational secondary (sympathy) action, it is nevertheless protected in EU law by virtue of the ILO right according to which secondary action is allowed if the primary action is lawful.²²⁵ In other words, this model of interpretation would demonstrate the contradiction between the ILO and UK law concerning the (il)legality of sympathy action, as well as being complemented by the contradiction between UK law and Article 6(4) ESC.²²⁶ This will also logically lead the ECJ to take stand via

²²⁰ As to freedom of association in the context of an international secondary (solidarity) action, note that the complaint of the International Confederation of Free Trade Unions (ICFTU), the ITF, the Australian Council of Trade Unions and the Maritime Union of Australia against Australia (ILO report No. 320, case No. 1963 (Doc. Vol. LXXXIII, 2000, Series B, No. 1)) also included a recognition of the international dimension of a solidarity action. The ILO Committee on Freedom of Association requested that the government ensure that in future 'trade unions are entitled to maintain contact with international trade union organizations, to participate in their legitimate activities and to benefit from the services and advantages of such membership.' See the report mentioned, paragraph 241(e).

²²¹ A first reflection of freedom of association in UN instruments appears in the Universal Declaration of Human Rights. According to its Article 23(4) 'Everyone has the right to form and to join trade unions for the protection of his interests.'

²²² On the 'Albany model', see section 4.10.4 of the second publication.

²²³ See p. 111 of the second publication, at the end of section 4.9.1.

²²⁴ See p. 123 in the second publication.

²²⁵ See especially footnote 217 of the second publication, and, footnote 218 on secondary boycotts; see also the next footnote here on the situation that a sympathy strike is lawful provided that the primary action is lawful.

²²⁶ The ILO Committee of Experts for the Application of Conventions and Recommendations (CEACR) has on several occasions expressed criticism (according to Tonia Novitz, *International and European Protection of the Right to Strike*, Oxford University Press 2003, p.

preliminary rulings on a situation where an EU Member State is at variance with its international obligations,²²⁷ provided that the collective action falls under EC law as the ITF circular does. In fact, this would imply a stock-taking on the FOC policy in general (see also section 3.3, *infra*). The ECJ faces a profound challenge in deciding whether or not to protect the rights guaranteed in the international instruments in this kind of cross-border situation, in this case at least in the ILO and Council of Europe provisions – notwithstanding the disobedience of a particular Member State. The international law argument as to Article 307 EC is one of a *de jure* nature and of a settled case-law as to the binding effect of general international law.

2.7 Gender Equality; Especially Equal Pay

Following the brief equal-pay comments in the first publication, I discuss it now on a somewhat broader basis and finally add some notes on the status of equal treatment in an *ordre communautaire social* approach.

Developments regarding equal pay between genders form a telling example of changes towards a more mature status for the social factor, for its part now justifying the discussion on *ordre communautaire social*. As explained in the first publication, in *Defrenne II*,²²⁸ the Court emphasized how the aim of Article 119 EEC was at once economic and social, which showed that the principle of equal pay formed part of the foundations of the Community.²²⁹ The economic and social factors were put on an

292, which is not her dissertation, as I indicated in my third publication on p. 84 but a developed version, in 1989, 1990, 1992, 1993, 1995, 1997, 1999 and 2000) against the prohibition of sympathy strikes in the United Kingdom. Lastly, in its report for the ILO Conference 2005, the Committee ‘once again’ reiterated its position that workers ‘should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful and to take industrial action in relation to matters which affect them even though the direct employer may not be a party to the dispute, and requests the Government to continue to keep it informed in its future reports of developments in this respect’; Report of the CEACR 2005, p. 123. The same substance was expressed in the Report for the Conference 2003, p. 319. The 2005 Report presented the position of the British government (p. 123), being that ‘it believes that the restrictions on secondary and solidarity strikes reflect the United Kingdom’s experiences and needs and that strike law gives sufficient scope for unions to protect the interests of their members.’

The supervisory organ of the European Social Charter, nowadays the European Committee of Social Rights, has found that United Kingdom is in breach of Article 6(4) of the European Social Charter, the prohibition of secondary action (except peaceful picketing at the worker’s own place of work) being one reason for this conclusion; see, e.g., Conclusions XVI-1, 1.1.2002, pp. 688-690; available via www.coe.int.

²²⁷ The infringement procedure under Article 226 EC does not cover disobedience of the international obligations of the Member States, but only direct obligations under the EC Treaty.

²²⁸ Case 43/75 *Defrenne II* [1976] ECR 455.

²²⁹ See pp. 55-56 of the first publication. Retrospectively I may admit that the contention (p. 56) that the Court would have granted precedence for the social factor over the economic one in the application of Article 119 EEC in *Defrenne II* is too straightforward. It is obviously more subtle to note that the Court essentially elevated the role of the social factor to equality with the economic one, which led to considering it a part of the foundations of the

equal footing in this way. It was of course crucial that the Court confirmed the direct effect of Article 119 EC (now 141 EC), although it did so *ex nunc*. Covering the horizontal direct effect as well,²³⁰ this decision was in fact more powerful than the enactment of the Equal Pay Directive 1975/117/EEC. The direct effect was opposed in the proceedings by the fact that Article 119 (as 141 EC) used the term ‘principle’ (of equal pay). The Court was straightforward in its assertion that “[i]n the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions, as is shown, for example by the heading of the first part of the Treaty which is devoted to ‘Principles’” (paragraph 28). By reducing a principle to the level of a vague declaration, the very foundations of the Community would have been indirectly affected (paragraph 29).

Defrenne II has been referred to by 42 later decisions (on 12 February 2007), although in many of them, of course, because of the general question of direct effect in EU law. One of the recent judgments is *Cadman* in which the Court recognised that if the worker provides evidence capable of raising serious doubts about discrimination, the employer also has to justify pay differences in a context of rewarding seniority which in general terms is disadvantageous to women. In practical terms, the employer must be able to prove that longer experience has enabled the corresponding male workers to perform the tasks for which they are rewarded better. In practice, this binary rule on the burden of proof may often be excessively difficult for female workers. However, in *Cadman* the Court also reiterated the message stemming from *Defrenne II* that the principle of equal pay, ‘which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community’.²³¹ Indirect discrimination was a novelty in most of the Member States, within Article 119 EC especially, later codified by the Burden of Proof Directive 97/80/EC.²³²

Community (paragraph 13 of the judgment). This was linked to the expressly foreseen implementation of the provision by 1 January 1962.

²³⁰ That the direct effect has its limits, i.e., that it requires the single source of discrimination (state regulation, collective agreement or work rules established by a holding company) when the comparable male workers do not work in the same establishment or service, was confirmed inter alia in case C-320/00 *Lawrence* [2002] ECR I-7325, paragraph 18, and case C-256/01 *Allonby* [2004] ECR I-873, paragraphs 46 and 83.

²³¹ See case C-17/05 *Cadman v Health & Safety Executive* [2006] ECR I-9583, paragraphs 28 and 40. The AG proposed a bold revision of the *Danfoss* judgment (Case 109/88 *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening* (*‘Danfoss’*) [1989] ECR 3199), on the basis that ‘a system which excludes periods of maternity or paternity leave, although it is prima facie neutral, would result in indirect discrimination against women’; paragraph 63 of the opinion. The AG wanted, however, to exclude retroactive claims on indirect discrimination on this basis. In the judgment, the Court did not expressly dismiss the proposition of the AG but de facto left the decision for the national court, thus to be made *in casu*.

²³² According to the Directive ‘indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex’. Sacha Prechal has noted that in fact only the UK law included this principle independently of EC law developments; Sacha Prechal, *Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes*, CMLRev. 41: 533-551, 2004, at pp. 535-6.

Inherent in the concept of indirect discrimination is a requirement that there should be a substantive notion of equality.²³³ On the other hand, indirect discrimination is possible to justify by objective reasons unrelated to sex, the consistent application of which concept is debated in the literature.²³⁴

An area where the legally established non-discrimination in pay does not have an effect is that of institutional or structural discrimination, that linked to generally low wages in sectors predominantly occupied by women. Otherwise it is obvious that equal treatment is much less guaranteed in the field of social security than in employment law. Discriminatory laws and practices can be concealed in the general margin of discretion in the application of the present directive 79/7/EC on progressive implementation of the principle of equal treatment for men and women in matters of social security, and even on its express derogations concerning inter alia ‘persons who have brought up children’ and ‘dependent wives’. Substantive equal treatment in social security is still short of unanimity, and will remain so in the Reform Treaty.

Coming back to equal pay in Article 141 EC, the developments in pay equality have thus produced a rich case-law since *Defrenne II* which reflects the emergence of the human rights angle in addition to the fading out of the ‘semi-economic’ origins of Article 119 EC. In 2000, the Court in *Deutsche Post v Sievers* (as well as in *Deutsche Telekom v Schröder*) concluded that ‘the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings

²³³ This is the position also endorsed by AG Poirares Maduro in the *Cadman* case (footnote 231, *supra*). Sacha Prechal (previous note) has pointed out that the Court has not been consistent on this issue. For example, cases C-170/84 *Bilka* [1986] ECR 1607 and 116/94 *Meyers* [1995] ECR 2131 witness a substantive approach, whereas cases C-297/93 *Grau-Hupka* [1994] ECR I-5535 and C-278/93 *Freers* [1996] ECR I-1196 show a formal approach. Of these cases, judgment in *Bilka* was given by the full Court. In *Grau-Hupka* the final issue was that Directive 79/7 on equal treatment in matters of social security does not require the Member States to grant advantages in respect of old-age pension schemes to persons who have brought up children or to provide benefit entitlements where employment has been interrupted in order to bring up children. On the other hand, in *Freers*, the Court in any case outlawed a national scheme that discriminated against part-timers, and thus women.

²³⁴ See, e.g., Catherine Barnard, *EC Employment Law*, 3rd ed., Oxford University Press 2006, pp. 368-371, who comes to the conclusion that in the justifications there is a strict test (*Bilka*, previous footnote) for indirectly discriminatory conduct by employers, the weaker *Seymour-Smith* (case C-167/97 [1999] ECR I-623) test for indirectly discriminatory employment legislation and the very dilute test for social security legislation in *Nolte/Megner* (cases C-317/93 [1995] ECR I-4625 and C-444/93 [1995] ECR I-4741). The background is that directive 79/7/EC on progressive implementation of the principle of equal treatment for men and women in matters of social security works in the framework where the Court acknowledges a considerable margin of discretion for the Member States, as the Community law now stands, where, in terms of Fitzpatrick, the objective justification for indirect discrimination de facto amounts “to little more than ‘reasonable subjective justification’”. Paragraph 35 of *Megner* was his point of reference. See Barry Fitzpatrick, *Converse Pyramids and the EU Social Constitution*, in Shaw (ed.) *Social Law and Policy in an Evolving European Union*, Hart Publishing 2000, p. 321. Thus, while the present author criticised the Fitzpatrick’s analysis in the second chapter of the first publication for his general framework in explaining the EU’s social dimension as rigidly subordinated to economic aspects, it looks as if Fitzpatrick’s analysis of the problems in equal treatment in social security is adequate, and is shared by Barnard.

established in various Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.²³⁵ This passage has been called both radical (Ellis), dramatic (Szysczak) and a paradigm shift (Kenner),²³⁶ while Judge Rosas has remarked that '[t]his quotation from the Court's case-law shows that the social dimension of the EU has to be considered as a value in itself, not necessarily subordinate to the economic freedoms inherent in the EC Treaty'.²³⁷ This statement, i.e., speaking of the social dimension in general terms instead of mere pay equality, is indeed justified given that the national court referred to the risk of distortion of competition between economic operators of the various Member States in the context of pay equality, fair competition being fundamental to the EU's economic constitution.²³⁸

It is indeed essential to understand the historical developments in gender equality since the foundation of the Community. Article 119 EC, based on 'semi-economic' and competition considerations has now been transformed as enshrining (in Article 141 EC) a fundamental human right that is essentially social. In more general terms, while the details in the social security part of equal treatment (and the structural, i.e., extra-legal discrimination) still overshadow the overall picture, the fact is that even from a Nordic point of view gender equality in EC employment law has been a real source of practical development, pushing a positive change through, especially regarding pay. Today the scope of the EU gender equality policy is essentially broader than equality in the field of pay or working life in general (which also covers positive measures of the Member States in favour of the under-represented sex under Article 141(4) EC). The addition of gender equality to the tasks of the Community in Article 2 EC and the mainstreaming principle in Article 3(2) EC reflect these developments, which also reiterate the principle that 'labour is not a commodity'. Article 13 EC is today the basis for general EU measures against discrimination based on sex. Furthermore, 'equality between men and women must be ensured in all areas, including employment, work and pay' (including specific advantages for the under-represented sex). This is recognized as a fundamental right by the EU Charter (Article 23).²³⁹ It is therefore justified to state that gender equality is an elementary and irrevocable part of *ordre communautaire social*. However, the EU cannot assume the entire credit for these developments, which is obvious even in *Defrenne II*, a decision inspired by the ILO's Equal Pay Convention No. 100, which embodied the principle of equal pay for work of equal value in 1950 (see paragraph 20 of *Defrenne II*).

²³⁵ Case C-270/97 *Sievers v Deutsche Post* [2000] ECR I-929, paragraph 57.

²³⁶ See Evelyn Ellis, The supremacy of Community pensions equality law: a two-edged sword? *European Law Review* 2000, Vol. 25, p. 568; Erika Szysczak, The New Paradigm for Social Policy: a Virtuous Circle, *CMLRev.* 38: 1125-1170, 2001, p. 1155; Jeff Kenner, *EU Employment Law. From Rome to Amsterdam and Beyond*, Hart Publishing 2003, p. 462.

²³⁷ Allan Rosas, The Role of the European Court of Justice in the application and interpretation of social values and rights, in Elina Palola and Annikki Savio (eds.), *Refining the Social Dimension in an Enlarged EU*, Stakes 2005, p. 199.

²³⁸ I recall that the conclusion of the Court was natural in being given by a small chamber. The case(s) was (were) not supposed to give rise to dramatic new positions.

²³⁹ It is essential that 'specific advantages' not be construed as exceptions to the right to equality but as a building block of substantive equality; see, e.g., Yota Kravaritou, *Equality between men and women*, in Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos 2006, p. 249.

2.8 The Social Dimension in the Context of Competition Rules

In this section I first shape the essential issues under this heading as analysed in the third publication and then make some *ordre communautaire social* comments.

The case-law discussed in the third publication on the demarcation between the social field and competition rules showed the variable weight granted to social and economic factors. In fact *Becu*, *Deutsche Telekom v Schröder* and *Albany* show precedence granted to the social factor,²⁴⁰ while *Höfner* and *Job Centre* show precedence for the competition (economic) values, although within the limits of a manifest incapacity to satisfy demand in a given market. In *Höfner*, its general value is also diminished by the fact that it concerned recruitment of executives, which frequently, if not predominantly, happens outside the monopolistic public placement service at issue in the case.

The *Albany* debate in the third publication (section 1.3) shows that various criticism of this decision, in which the Court established a conditioned immunity of collective agreements from competition rules, exists. Vagueness in *ratione personae* (Evju), reflecting unfair precedence for the social factor (De Vos), lacking ‘law and economics’ aspects (Ichino) and an avoidable recourse to European collective agreements (Sciarra)²⁴¹ were the main issues discussed. The present author does not find all of these convincing, the criticism by De Vos being in its own class as reflecting a purely neo-liberal legal approach. *Albany* is a constitutional decision which, however, being of the pre-Amsterdam era (as to the events at issue) avoided any fundamental rights discussion. While the immunity of collective agreements was confirmed against competition rules that are ‘fundamental for the Community’ (*Eco Swiss*), it is justified to find that the Court in *Albany* elevated the right to collective bargaining to a status essentially superior to these other rules ‘fundamental for the Community’ in practice, i.e., to a status equal to a fundamental right in EU law.

Albany is also unique in declaring the interpretative method in its reasoning on the immunity of collective agreements: ‘effective and consistent’ interpretation of the provisions of the Treaty as whole. It is clearly a ‘sister’ of *CILFIT*,²⁴² paragraph 20, which stated how ‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’. Thus *Albany*, unlike *CILFIT*, declared the ‘effective and consistent’ interpretation of the provisions of the Treaty/Community

²⁴⁰ On the balancing in *Albany* between the economic and social values, especially the difference between the approaches of Advocate General and the Court, see also the discussion in the first publication in section II.2.6. Indeed, understanding that giving precedence to the economic (competition) values would have meant to subordinate first the collective agreements to competition scrutiny and then free them with a ‘social safety valve’ (and obviously from the then strict administrative procedure) is crucial. The Court did the reverse since the judgment implies a safety valve against masked distortions of competition via the nature and purpose criteria.

²⁴¹ See footnote 24 of the third publication.

²⁴² Case 283/81 *CILFIT* [1982] ECR 3415.

law as a whole.²⁴³ On the other hand, the *CILFIT* lesson on the evolution of Community law helps in the pre- and post-Amsterdam understanding and interpretation of *Albany*. As such, *Albany* itself also reflects the evolution of EC law by including in paragraphs 56 to 58 the references to European social dialogue in Article 118b EC and Articles 1 and 4 of the Maastricht Social Policy Agreement. Thus, *Albany* is important not only in the precedence given to the social factor over the economic one (competition values), but also in its status as a landmark in the evolution of European collective labour law.²⁴⁴ Maastricht was its overall breakthrough (albeit initiated by Article 118b EEC that was introduced by the Single European Act) while *Albany* established its basic status in relation to internal market rules. It was a judge-created settlement of that relationship. It naturally raises issues possibly subject to analogous interpretations.

A first question about the *Albany* analogy concerns the relationship between labour law enactments and competition rules; a ‘labour exemption’ or at least a ‘labour law exemption’. I found ‘social field’ as such too diffuse a concept on which to base an exemption from the application of competition rules. However, the conclusion in the third publication was that at least a ‘labour law exemption’ looks justifiable on the analogy of *Albany*, as indicated by *Becu* and *Deutsche Telekom v Schröder*. General caution in analogous interpretations naturally suggests that we may not forget an *in casu* approach.²⁴⁵ A second analogous question is posed by the national Court in *Viking*,²⁴⁶ which asks whether an industrial action ‘falls outside the scope of Article 43 of the EC Treaty and/or Regulation 4055/86 ... in particular by analogy with the Court’s reasoning in ... *Albany*, paras 52-64’. Thus, the second analogous question is

²⁴³ The ‘effective and consistent interpretation’ can be seen also as a comment on the opinion of the Advocate General in *Albany*. None of its 480 paragraphs was expressly reflected by the judgment. Amongst other things, the opinion considered whether trade unions are undertakings in the sense of competition law and proposed a clearly more limited immunity than that of the Court. The AG thus proposed that ‘collective agreements between management and labour concluded in good faith on core subjects of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties are not caught by Article [81(1)] of the Treaty’ (paragraph 194). For the sake of completeness it must be added that the AG also clearly saw the purpose of trade unions and collective agreements: ‘...the main purpose of trade unions and of the collective bargaining process is precisely to prevent employees from engaging in a ‘race to the bottom’ with regard to wages and working conditions. That is why collective bargaining is encouraged by all national legal orders, international legal instruments and more particularly by the Treaty itself’ (paragraph 178).

²⁴⁴ On the other hand, the basic legal rationale in *Albany* for its part in a way mitigates or puts limits on its exceptionality. Where the Advocate General found that there is an agreement between the employers in a sectoral collective agreement in the sense of Article 81 EC, the Court upheld the labour law concept of a collective agreement. The tie *between* the parties is crucial, not that *inside* a party. This position, anchored in the leading Articles of the EC Treaty (paragraph 54 of *Albany*) and even in the European social dialogue and agreements, simply repeats the classic labour law concept of a collective agreement.

²⁴⁵ On this analogy, see the third publication, section 1.3.5.

²⁴⁶ The fundamental rights dimension of this case is discussed in section 2.5, *supra*, showing the need to build the protection for the right to collective action within EU law in section 3.2 *infra*, and some other details are dealt with in section 4.10.5 of the second publication. I discuss an analogical interpretation of *Albany* in *Laval* in section 4.10.4 of the second publication; see also footnotes 312 and 313 therein.

the relationship between strike rules and the two market freedoms in question (freedom of establishment and services). Whereas the scope and purpose of the market freedom rules are not identical to those of competition rules, the Court obviously cannot literally repeat the reasoning of *Albany* in *Viking*.²⁴⁷ However, the social policy objective of improved working conditions is the same in principle as in *Albany* and the restriction on free provision of services (or on establishment rights) by a strike is inherent, as were certain restrictions on competition in sectoral collective agreements (*Albany*, paragraph 59).²⁴⁸ Thus there are relevant issues supporting an analogous interpretation of *Albany* regarding an industrial action restricting market freedoms.²⁴⁹ A third analogous situation would be a conflict between a strike and EC competition rules. In such a situation it would be entirely natural to apply *Albany* very literally, with the nature and purpose test included.

What can be said about the social dimension in the context of competition rules when seen in terms of *ordre communautaire social*? It looks obvious that the analysis of case-law other than *Albany* and *Deutsche Telekom v Schröder* (the latter discussed above under Equal Treatment, section 2.7, *supra*), and thus *Höfner*, *Job Centre* and *Becu*, would not invite major modifications.²⁵⁰ *Höfner* and *Job Centre* seem to belong to the economic constitution of the EU in a way that will obviously be sustained irrespective of fundamental rights developments for the foreseeable future, even in the Reform Treaty; see section 3.4, *infra*. Their bottom line is that a manifest incapacity to satisfy demand in a given market trumps a national placement monopoly once established under the state's social policy. Definition of a market is naturally debatable and subject to differing societal values, but it looks probable that a monopolistic placement agency may be *prima facie* trumped by the application of this 'manifest incapacity to satisfy demand', even in the maritime field. Another aspect is that the international law argument present in the *ordre communautaire social* approach to fundamental rights could maintain such a monopoly under Article 307, first paragraph, EC, thus based on ILO Convention 179 (now under the Maritime Labour Convention, 2006), but untouched by the EC competition rules and market freedoms. In *Becu*, the regime on recognized dock workers reflects special protection in a dangerous profession. It is a tailor-made scheme with the status of the worker as its natural framework, thus reflecting the 'labour is not a commodity' principle. As to pay, the regime operates with an *erga omnes* collective agreement, reflecting the European social model. In this case temporary work was used to undercut the pay

²⁴⁷ See the second publication, section 4.9.1, p. 110, and section 4.10.4. The same substantive question (industrial action v. market freedom) is present in *Laval* while the Labour Court of Sweden did not put the question about a possible analogous interpretation of *Albany*.

²⁴⁸ As a theoretical example (not purely so) I may take an industrial action in the banking sector (or just in a bank established in two Member States). An action by bank officials cannot in general terms become unlawful simply because it cuts rather than 'infringes' free movement of capital and payments between the Member States. Accordingly, drivers' strikes may cut the free movement of goods but cannot be simply unlawful because of this.

²⁴⁹ I recall the assumption that, had the collective agreement subject to judgment *Albany* emerged from a strike and had that strike also been subject to a challenge by virtue of competition rules, it would obviously have received the same treatment as the agreement. See also the reasoning on the ITF's action in *Viking*, discussed in section 2.6, *supra*.

²⁵⁰ The same concerns case C-222/98 *van der Woude* in which the collective agreement concerned led to subcontracting a sickness insurance scheme; this was covered by the *Albany* immunity (paragraph 26).

provisions in that collective agreement which did not gain support from the ECJ as the judgment expressly demonstrates.

Albany, when considered in an *ordre communautaire social* way, reflects ‘labour is not a commodity’ first in the sense that labour is subject to protection independent of the competition law premises. It is noteworthy that the 1914 Clayton Act in the US had already stated that the ‘labour of a human being is not a commodity or article of commerce’ as a ground for antitrust immunity on unilateral activities of trade unions in the course of labour disputes.²⁵¹ Second, *Albany* is at the heart of the EU’s social policy,²⁵² more particularly improvement of remuneration (pension provisions in this case). Third, the fundamental rights angle is missing in the judgment as discussed in section 1.3.5 of the third publication. That aspect is the one where the *ordre communautaire social* thinking would essentially enrich the argument, although it would not radically change the outcome; i.e., the conditions for the *Albany* immunity. Fourth, *Albany* concerns national sectoral collective agreements declared *erga omnes* and belonging to the ‘hard core’ of the European social model. The essential historical and constitutional value of *Albany* comes from the fact that it represents an instance of valuing collective labour agreements, i.e., the essence of collective labour law, in their relationship to competition rules; ‘Article 81 EC (ex Article 85) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community’.²⁵³ It is true that Transfer of Undertakings (Acquired Rights) Directive and Posted Workers Directive operate with collective agreements (and even the Collective Redundancies Directive refers to them in Articles 2(1) and 2(3)(b)(vi)), but *Albany*’s ‘added value’ comes from a higher level position, including as it does positioning of the social factor in its relationship with competition rules that belong to the ‘*economic constitution*’ of the Community. In so doing *Albany* is an elementary block of collective labour law in the *ordre communautaire social*.

Is *ordre communautaire social* relevant in the context of Article 86(2) EC? It is so at least to the extent that the public service concerned may reflect or include features of collective labour law, such as in *Albany* (discussed in section 2.5 of the third publication) or in the case of the Finnish earnings-related pension scheme TEL (discussed in sections 2.6 and 2.7 of the third publication). In the former, the pension scheme concerned was directly established by a collective agreement (rendered binding *erga omnes*), while in the latter the social partners have concluded specific labour market agreements on the essential parts of the scheme comparable in their practical effects at legally binding collective agreements between management and labour. Both schemes are fruits of the European social model, beside embodying a

²⁵¹ See paragraph 97 of the Opinion of AG Jacobs in *Albany*. As a curiosity, one may recall that AG Jacobs also noted that ‘in economic terms labour in contrast to raw materials - is not a homogenous commodity’; given the differences in productivity, ‘competition on labour as a cost factor is in reality strong’, the AG asserted (paragraph 182).

²⁵² Paragraph 54 of *Albany* noted the presence of both the competition law regime and social policy in Article 3 EC. Thus, if Article 3(1)(j) EC enshrining the EU’s social policy in itself perhaps offers ‘no peg on which to hang anything about the nature of Community competence’ (see Kapteyn and VerLoren van Themaat, Introduction to the Law of the European Communities, 3rd ed. 1998, p. 1045) it may gain real impetus in an actual context, as in *Albany*.

²⁵³ Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 36.

considerable degree of solidarity.²⁵⁴ Another angle is that we may also speak about the ‘European social model’ in a different sense as highlighting (inter alia) the status of public services in the European welfare states. In this sense, even the Reform Treaty will reiterate the language of ‘general economic interest’ in describing the public services concerned, both in the new Article 14 and in (the old) Article 86(2) in the draft Treaty on the Functioning of the European Union. Expert knowledge remains the real effect of Article 86(2) as also sheltering services falling under a ‘particular social task of general interest’ (*Albany*, paragraph 98). A democratic ‘constitutional charter’ would also mean a treaty understandable to the general public. However, a step forward is the new opportunity to lay down community rules by qualified majority on the economic and financial conditions for the provision, commissioning, and funding of public services by the Member States, who will still retain their primary competence over these services (always respecting the Treaty).

²⁵⁴ See paragraph 108 of *Albany*. In the Finnish TEL scheme, solidarity is reflected especially by the pay-as-you-go system, which represents the main part in its financing. Workers (roughly a quarter) and employers (three quarters) finance the scheme; see section 2.6.3.1 of the third publication. As an example of the solidarity notion one may refer also to case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 58, where the ECJ employed the phrase ‘social function based on the principle of solidarity’ as a yardstick delimiting the ambit of ‘economic activities’ and thereby competition rules.

Chapter III

Ordre communautaire social in a Historical Perspective

3.1 General Conclusions on *ordre communautaire social*

In this section I will characterize and offer concluding general comments on *ordre communautaire social*, the tentative new paradigm of EU labour law. The issues discussed in chapter II enable us to explore and understand *ordre communautaire social* in a sense broader than merely the relationship between labour law and market freedoms, as well as competition rules. However, I will focus on that relationship as the hard core of *ordre communautaire social*. A further conceptual clarification is that in the literature on the EU social and labour law the term ‘social constitution’ is sometimes used as corresponding to the EU’s ‘economic constitution’ that covers the market freedoms and competition rules. In describing or shaping the EU’s new labour law paradigm, the conventional term ‘social constitution’ would be, however, too closely linked to the written primary law of the EU (whereas the material contents concerned are partially taken from outside sources or from EU Treaty or the Charters of Fundamental Rights of 1989 and 2000), so that it seems better therefore to stick to ‘*ordre communautaire social*’. Equally, the concept of ‘social constitution’ is too limited if equated to those of the abandoned Constitutional Treaty. At the same time, it is appropriate to keep in mind that conceptual generalisations are not problem-free while they may help in understanding and discussing law and thereby even in creating it. On these postulates, *ordre communautaire social* can be tentatively characterized to mean

a synopsis of the leading premises ('labour is not a commodity', European social model and the EU's social policy) and principles (the EU's founding legal principles, upward harmonisation and improved working conditions, respect for fundamental rights and non-discrimination) of European labour law, especially collective labour law that, in so far as they are principles, are to be understood as generally binding, or at any rate subject to compromises only as delimited by the principles themselves.

In explicating this account, one may find that *ordre communautaire social* thus, firstly, ‘works’ in principle regarding individual labour law as well, but its impact is essentially more prominent in collective labour law, owing to the underdeveloped nature of that area in EU law. The concept (or paradigm) implies, secondly, that there is a multilayered corpus of Community labour law *sensu lato* (the Treaties, international and Community fundamental rights, and secondary law). Thirdly, while the market freedoms and competition rules are by far the most important counterpart or *ordre communautaire social*, the effect of this concept is implicitly broader than simply labour law. It is finally a concept that defines the status of the so far underdeveloped collective labour law in the *acquis communautaire* especially, most importantly in relation to the market freedoms and competition rules. Fourthly, it also implies that EU labour law is, although a part of the *acquis*, also an independent and already relatively developed area of EU law, despite all its still existing ties to internal market regulation, deficits and even certain incongruence, in which one may define its basic principles from the starting-point of real social needs instead of as a corollary or derivative of the EU’s ‘economic constitution’. It is a part of the ‘social constitution’

of the EU but at the same time essentially more than that, given the partially extra-Community fundamental rights especially. It has its descriptive (or legal-ideological) role in the doctrinal sense, but it includes normative and settled case-law elements as well, via the binding effect of fundamental rights, international law and the principle of non-discrimination. By the same token, the social values concerned are not to be seen as subordinated to economic ones, but are at least well balanced (see below) and, besides, examples of the de facto precedence of the social factor exist already. Fifthly, OCS necessarily also implies a sense of the basic status, nature and impact of labour law on the market freedoms (and competition rules; *Albany*) that underpin the ‘economic constitution’ of the Community.

Hence, the contents of *ordre communautaire social* invite us to consider further the basic concepts of the Community itself, in particular its ‘economic constitution’. I explore them briefly to background a discussion of the above components of *ordre communautaire social*. I take a streamlined positive story first. The Single European Act with its social dimension and introduction of the European social dialogue, the latter making its breakthrough in Maastricht, the Treaty on European Union and the new Social Chapter of the Treaty of Amsterdam together with the rather broad (and partially agreement-based) secondary labour legislation and relevant case-law such as *Defrenne II*, *Albany*, *Mangold*, *Schröder* and *BECTU* convince us to reiterate that the Community is no longer a predominantly economic organisation, but that it takes the social dimension seriously and genuinely respects labour law. The fundamental rights developments (the EU Charter of Fundamental Rights) since Amsterdam further support this notion, which forms the historical basis for the *ordre communautaire social*. More elements to this positive story appear in the previous publications (such as those in posting of workers and gender equality in pay) and will follow below. The doubtful story is that the Community naturally also carries with it the history of the European Economic Community with the powerful although no longer generally overriding position of the economic factors. It still presents fundamental rights as a priori restrictions on the market freedoms, for instance (see case *Schmidberger*, paragraph 77), and will thus coherently recognise labour and social rights on an equal footing with the economic ones via the entry into force of the Reform Treaty by making the EU Charter of Fundamental Rights legally binding (see section 3.4, *infra*). It would also mean putting the economic freedoms eventually into a position which is natural in a social Union. However, in the meantime, the concept of *ordre communautaire social* can alleviate the pains in this doubtful story and also work as a symbol further reinforcing the status of labour law in the Community.

The pain in this doubtful story can be eased to some degree by recalling that the Community has hardly been based on limitless market freedoms and competition. It includes features of that type, like the *prima facie* absolute freedom of establishment for companies which implies even the right to openly circumvent the share capital regulations as the *Centros* judgment shows.²⁵⁵ Public policy exceptions to the market

²⁵⁵ Case C-212/97 *Centros* [1999] ECR I-1459; a Danish family enterprise with all its activities in Denmark, established itself in United Kingdom and wanted to register only a branch in Denmark, so as to avoid the Danish minimum share capital rules. This was accepted although with the recognised possibility of the Member States to combat abuses. The judgment generated writings considering a possible Delaware effect in EC labour law and affecting the evasion of the German co-determination (*Mitbestimmung*) system by establishing (a parent company) outside Germany. Such phenomena would be by definition

freedoms, however, have been in the Treaty since the beginning (Articles 30, 39(3), 46(1) and 58(1)(b) EC) and accepting non-discriminatory restrictions by overriding requirements of public interest is consistent case-law. Furthermore, acknowledging the right of the Member States to extend their minimum wages either in law or collective agreements to posted workers in *Seco* in 1982 shows an important limit on the market freedom to provide services.²⁵⁶ Perhaps a more graphic although in a way trivial example of such limits is the judgment *Renault v Maxicar* that concerned the French intellectual property rights relating to vehicle body parts. A French judgment on forgery by manufacturing and marketing body parts for Renault vehicles was to be executed under the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in Italy against Maxicar who invoked what the ECJ called a ‘principle of public policy in economic matters’ (*principe d’ordre public économique*) against these rights,²⁵⁷ thus an alleged Community law principle of unlimited economic freedoms (free movement of goods and freedom of competition in this case). In its ruling, the ECJ implicitly accepted the French intellectual property rights and thus dismissed the idea of unlimited free movement of goods and free competition as a European public policy in economic matters. The analogy with *ordre communautaire social* is obvious: as much as the intellectual property rights inherent in a myriad of sophisticated businesses were capable of limiting the market freedom and competition, so corresponding limitations are not simply possible but are indeed natural on the basis of *ordre communautaire social*. The other way round, since the economic freedoms have to be interpreted and applied in conformity with it, the effect of *ordre communautaire social* is by no means unfounded but finds direct support in the prevailing interpretation of the market freedoms themselves (and in competition rules), i.e., in the ‘economic constitution’ of the Community. The theoretical dichotomy between an unlimited European public policy in economic matters and *ordre communautaire social* would naturally be the sharpest possible, if not insurmountable. Happily, such a dichotomy is only theoretical.

So as to clarify the concept of *ordre communautaire social* further I may also refer to Maduro’s concept and broad reading of the ‘European Economic Constitution’. In ‘We the Court, the European Court of Justice and the European Economic Constitution’ (1998), he describes this concept as twofold: (i) the constitutional (neo- or ordoliberal)²⁵⁸ interpretation of free movement and competition rules, or (ii) that

not in conformity with *ordre communautaire social*. In a further establishment case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 92, the ECJ recognised in an *obiter dictum* that protection of the interests of employees may ‘in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.’ A hard case judgment on the lot of co-determination when ‘harassed’ by freedom of establishment has not yet arrived.

However, this *Centros-Überseering* doctrine as such must remain beyond this study.

²⁵⁶ See section 1.2.2 of the second publication, at footnote 14.

²⁵⁷ Case C-38/98 *Renault v Maxicar* [2000] ECR I-2973, paragraph 24. On this judgment, also see footnote 323 of the second publication.

²⁵⁸ The essence of the (originally German) ordoliberal concept was setting up the economic rationale (market freedoms protected from public intervention) at the supranational level and leaving political intervention in the form of social policy up to the Member States. See Christian Joerges, What is Left of the European Economic Constitution, EUI Working Papers Law 2004/13, concluding on p. 17.

related to anti-protectionism.²⁵⁹ He analyses the traditional reading and models of the European economic constitution on the basis of Article 28 (ex 30) EC, rejecting its neoliberal reading and asserts, going beyond the anti-protectionism view as well, that the concept must be enriched by adding social and cultural values. He further takes Article 28 EC as a fundamental political right instead of an economic one and also foresees the development of fundamental social rights as playing a role in the body of values concerned.²⁶⁰ In sum, he argues for the open character of the European Economic Constitution, ‘the economic model and powers of which will be the result of a discursive process...with competitive values, ranging from free competition to economic and social cohesion.’²⁶¹ He has since developed this argument, meaning that rights of participation and representation such as ‘the freedom of association, the right to collective bargaining, and the right to collective action should be considered as instrumental to a fully functioning integrated market which can increase efficiency and wealth maximization.’²⁶² Similarities in Maduro’s thinking with the concept of *ordre communautaire social* prior to his becoming Advocate General are obvious: both reject the dominance of the economic factors, require interpreting the economic freedoms in the light of fundamental social rights, highlight the evolutionary nature of the integration process, see the Maastricht Treaty as the essential ‘blow to the liberal concept of European integration’²⁶³ and both strive to bring something new into the European legal discourse. The difference is that Maduro ‘reread’ a well established concept whereas *ordre communautaire social* proposes a new one.

In sum, the general conclusion is that *ordre communautaire social* links the evolution of EU labour law to the general nature of the Community, witnessing its overall development from the European Economic Community into a political and social European Union where the dominance of the economic factor is over and the economic and social factors have already reached a relatively balanced mutual relationship, although it is still evolutionary. It is also fair to state that of the constitutive (although tentative) elements of *ordre communautaire social*, the most prominent is respect for fundamental rights, whereby highlighting the recognition of *international* rights in the EU might be the crucial added value of exactly this reasoning. Whereas their effect is most obvious in collective labour law, that area still deserves more elaborate discussion.

3.2 *Ordre communautaire social* and Collective Labour Law. Future Perspectives

The discussion on *ordre communautaire social* means arguing for a possible new paradigmatic notion of European labour law and its status in the EU’s legal order. Its five constitutive components have been shown to have considerable ties to and reflections in the examples discussed: directives on collective redundancy and transfer of undertakings (acquired rights), machinery safety, posting of workers, equal pay, the right to collective action, freedom of association and the social dimension (collective

²⁵⁹ Miguel Poiars Maduro, *We the Court, the European Court of Justice and the European Economic Constitution*, OUP 1998, p. 2.

²⁶⁰ *Ibid.*, p. 166-7.

²⁶¹ *Ibid.*, p. 168-9.

²⁶² Miguel Poiars Maduro, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, in Alston (ed.), *The EU and Human Rights*, OUP 1999, p. 470.

²⁶³ Maduro, footnote 259, *supra*, p. 160.

agreements in particular) in the context of competition law. Collective agreements are the common denominator normally present in one way or another in nearly all of these areas (machinery safety being the exception), although collective agreements also normally have a strong individual dimension by means of protecting a single worker in her/his employment relationship. The creation and legal consequences of collective agreements are their specific collective element. In any case, the debate on *ordre communautaire social* is predominantly one on collective labour law. I therefore concentrate on this below, without wanting to negate its impact on individual labour law, beside recalling that such a distinction is to a certain extent blurred in that equal pay, for instance, implies a collective element when assessing a legislative measure or collective agreement, or when discussing indirect discrimination.

A couple of institutional historical remarks on the EU's collective labour law 'regime' in order to pave way for further stock-taking on the present situation and future perspectives are in order. I have discussed the residual status of social and labour law at the inception of the Community and the 'new deal' in the 1970s in brief in the first publication.²⁶⁴ The latter stage involved even a debate about European collective agreements which understandably led nowhere. The next step was providing the opportunity for European agreements in the Single European Act of 1986 in Article 118b EEC. The 1989 Community Charter of Fundamental Social Rights of Workers was a similar fruit of the social dimension connected to the Single Market. The Treaty of Maastricht meant a further breakthrough in the basis of European collective labour law, also leading, in addition to the European Works Council Directive 94/45/EC, to agreement-based directives on parental leave, part-time and fixed-term work, as well as to sector-tailored solutions in the transport sector by way of the European Social Dialogue. Independent European framework agreements on telework, work-related stress, and harassment and violence have emerged since. Article F.2 in the original Treaty on European Union (now Article 6(2) EU) institutionalized the protection of fundamental rights in the ECHR and the constitutional traditions of the Member States as general principles of Community law, endorsing the ECJ's case-law.

The Treaty of Amsterdam was essentially a codification of the Maastricht Social Policy Agreement and the old EC Treaty in labour law, also embodying the principle that the Community will not issue EC directives on pay, the right of association, the right to strike or the right to impose lock-outs (Article 137(5) EC by the Treaty of Nice) under Article 137.²⁶⁵ Even the Constitutional Treaty would have embodied the same provision (Article III-210(6)), contrary to many proposals made in the Convention drafting it, and the Reform Treaty will reproduce it. That provision stands in striking contradiction to the EU Charter of Fundamental Rights and the Community Charter of 1989, as well as with the obligations arising out of the ILO provisions binding every Member State. Article 137(5) EC arguably does not exclude the issues

²⁶⁴ See sections I.1 and I.2 of the first publication. It suffices to add concerning the initial status of labour law in the Community the description of the then first Advocate General, later Judge, of the ECJ, G. Federico Mancini, who has eloquently stated how '[t]he founding fathers of the Community – and the same applies to the Council and the Commission in Brussels – never sought, or at all events never sought as their first aim, to reform the lot of the man who sells his labour'. See G. Federico Mancini, *Labour Law and Community Law*, *The Irish Jurist*, Vol. 20, 1985, p. 1.

²⁶⁵ See especially section 4.3 of the second publication.

concerned from the competence of the EU, which basically leaves the legal door open for at least EU measures under Article 308 EC or for a directive under Article 94 EC²⁶⁶ covering the basics of collective labour law. Further qualitative steps were the introduction of fundamental social rights by the Treaty of Amsterdam within Article 136 EC, i.e., with its references to the 1989 Community Charter and the European Social Charter, and the adoption of the Charter of Fundamental Rights of the European Union in 2000.

The position now is that the EU has created rules (regimes) on information and consultation within collective labour law as well as the European Social Dialogue, whereas the Charter of Fundamental Rights has already had its effect as a substantive point of reference (thus obviously more than just a source of inspiration) for the Community and its Courts.²⁶⁷ Simultaneously the interplay between the economic and social factors in the Community since the beginning has witnessed the gradual although far from exhausted growth of the social factor or dimension. This current position also inevitably leads to discussing the limits and future of European labour law, collective labour law in particular. That discussion also stems from the claim of the European Trade Union Confederation on full transnational trade union and workers' rights, in particular cross-border sympathy action including strikes.²⁶⁸

Let us now discuss the principal position of transnational regulation of collective labour law. In this era of globalization, the proviso in the Preamble to the ILO Constitution: 'Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries' is more convincing than ever. There is no comprehensive reason invalidating this statement regarding collective labour law. However, within the EU (of 27), even 'some harmonisation' (by Delors, see below) of collective labour law would be deeply biased by the national idiosyncrasies, such as the disparities in regulating (or even forbidding) sympathy strikes discussed in section 2.5, *supra*.

To begin a small doctrinal survey, I may note that Kahn-Freund had already expressed considerable doubts about the transplantation of collective labour law: 'In each country the relations between management and labour are organized under the influence of strong political traditions, traditions connected with the role played by the organisations on both sides as political pressure groups promoting legislation, and as rule making agencies through the procedures of collective bargaining'.²⁶⁹ His

²⁶⁶ See, however, the opposite position of Syrpis (on Article 94) in footnote 16, *supra*, and that of AG Mengozzi at footnote 289, *infra*. For a supporting argument, see the estimation by Ryan and the position of Wedderburn in footnote 286, *infra*. On the use of Article 308 EC as a legal basis, see the position of Judge Schintgen in footnote 286, *infra*.

²⁶⁷ I recall the cases C-540/03 *Parliament v Council* [2006] ECR I-5769, C-432/05 *Unibet*, judgment of 13.3.2007, nyr, and C-505/03 *Advocaten voor de Wereld*, judgment of 3.5.2007, nyr. See the comments in section 1.4.4, at footnotes 117-119, *supra*.

²⁶⁸ See "Make Europe Work for the People". Action Programme, adopted at the ETUC 10th Statutory Congress 2003, p. 24; similarly in the "The Seville Manifesto" adopted by the XIth ETUC Congress, Seville 21-24 May 2007. See my positive conclusion on cross-border (transnational) action in section 2.5, *supra*.

²⁶⁹ Otto Kahn-Freund, On Uses and Misuses of Comparative Law, *The Modern Law Review* Vol. 37, 1974 No. 1, p. 20. On this diversity in regulating the basic concepts of collective

conclusion was straightforward: ‘In my opinion...individual labour law lends itself to transplantation very much more easily than ...collective labour law. Standards of protection and rules on substantive terms of employment can be imitated – rules on collective bargaining, on the closed shop, on trade unions, on strikes, cannot’.²⁷⁰ On the other hand, in this context Kahn-Freund praised the work done by the ILO both on individual and collective labour law (Conventions 87 and 98) which is linked to the fact that impossibility in transplanting does not mean impossibility in setting up more general international rules while leaving the details to the Member States.

The description by Antoine Lyon-Caen and Spiros Simitis in 1996 in a precise Community context was that the original harmonisation plan of the Community lost all its credibility in the 1970s²⁷¹ although it has to be remembered that the original upward harmonization of working conditions (the ‘Common Market credo’) was accompanied by the expressly residual status of labour law and working conditions as well as the right of association and collective bargaining in Article 118 EEC, subject only to close cooperation between the Member States. This is what Article 140 EC still repeats. However, the semi-official harmonization idea appeared in a more modest form in the mid 1980s in enacting the Single European Act, which introduced not only Article 118b EEC but also Article 100a EEC (now Article 95(2) EC), proclaiming that provisions ‘relating to the rights and interests of employed persons’ were kept under unanimous decision-making in the Council. Without some kind of perspective or background debate on harmonisation of the rights and interests of employed persons this proviso would have been meaningless. Indeed, the Single European Act was enacted with the vision of Delors (and Mitterrand) in the background. Delors said that ‘...the creation of a vast economic area, based on market and business cooperation, is inconceivable – I would say unattainable – without *some harmonisation* of social legislation. Our ultimate aim must be the creation of a European social area’ (italics added).²⁷² It is still noteworthy is that Delors did not expressly spell out harmonisation of collective labour law, while not ruling it out either. However, the Commission also gave up on harmonisation plans in its Social

labour, i.e. freedom of association, the reach of the regulatory power of the social partners and the legal effects of collective agreements in the ‘old’ 15 Member States, see Olaf Deinert, *Der europäische Kollektivvertrag*, Nomos 1998, pp. 289-435. His conclusion is that in any case the regulatory power in all the (then) 15 Member States covers remuneration and other working conditions (while co-determination and participation in business decisions were outside his study).

²⁷⁰ Kahn-Freund, previous footnote, p. 21.

²⁷¹ They qualified harmonization from the point of view of 1990s as remaining only as a fine idea; ‘it does not represent a reference framework for action nowadays’; A. Lyon-Caen and Simitis, *Community Labour Law: A Critical Introduction to its History*, in Davies et al. (eds.) *European Community Labour Law*; Liber Amicorum Lord Wedderburn, p. 13. Their envisaged broad line of progress relied on EU fundamental rights policy. As to their view in a broader sense, see section I.1.1 of the first publication.

²⁷² Mr. Delors was aware of the challenging nature of his proposal. He continued: ‘This idea, may I remind you, was rejected as Utopian, dangerous, and irrelevant to the Community venture a few years ago. Today its purpose is clear: to ensure that economic and social progress go hand in hand’; speech by Mr. Jacques Delors in presenting the Commission’s programme for 1986, *Bulletin of the EEC* 2/1986, p. 12.

Policy Agenda for 2000-2005.²⁷³ Accordingly, the Treaty of Nice added a provision on cooperation between Member States in social policy matters to Article 137(2)(a) EC, stressing that this open method of coordination process goes on ‘excluding any harmonisation of the laws and regulations of the Member States’. Issuing minimum directives was naturally the measure kept available under Article 137(2)(b) EC, and Article 136 EC, first and third sub-paragraphs, in principle still maintains the (upwards) harmonisation target of social provisions.

Catherine Barnard has pointed out the ‘striking imbalance between the rhetoric of collective rights in the EU Charters and the Community’s actual action’ (in fact non-action) in the field. She further describes collective labour rights as a ‘Cinderella area’ in EU law and that ‘for the present they look destined to stay that way’. Since Kahn-Freund’s non-transplantation position is her background reference, it looks as if she still finds this position relevant.²⁷⁴ Ruth Nielsen, however, has come to a differing conclusion on this position, finding that Kahn-Freund’s thesis ‘does not apply similarly to EU labour law which seems to be able to overcome the institutional and procedural barriers’ inherent in national law. She further sees a “clear trend towards more reform in areas of ‘tough’ law such as collective labour law”.²⁷⁵

Meaning workers’ participation and collective bargaining, Weiss stated in 1990 that ‘the notion of harmonizing collective instruments and structures should be abandoned. The relevant institutions and instruments are tied too closely to the unique environments of the respective Member States; there is no adequate common denominator’.²⁷⁶ Rebhahn in principle sees more potential for a convergence regarding rules on collective agreements, less for conflict rules and no room for harmonization in workers’ participation beyond information and consultation.²⁷⁷ Despite the ‘non-regulation message’ of Article 137(5) EC, it is noteworthy that Blanpain’s European Labour Law of 2000 (7th edition) still included the idea of a fully-fledged European labour law²⁷⁸ although already complemented by a detailed presentation under the heading ‘Convergence or Divergence’. Blanpain’s conclusion today is that cost-related factors in labour law will unavoidably come closer to each other because of market, political, and trade union pressure, whereas labour relations and labour law (‘the way people are hired and fired, the way strikes are organised and so on’) will mainly remain disparate.²⁷⁹ More generally, Judge Schintgen has referred

²⁷³ ‘This new Social Policy Agenda does not seek to harmonise social policies. It seeks to work towards common European objectives and increase co-ordination of social policies in the context of the internal market and the single currency’; COM (2000) 379 final, p. 7.

²⁷⁴ Catherine Barnard, *EC Employment Law*, 3rd edition 2006, p. 776.

²⁷⁵ Ruth Nielsen, *European Labour Law*, Copenhagen 2000, p. 24.

²⁷⁶ Manfred Weiss, *Labor Law and Industrial Relations in Europe 1992: A German Perspective*, *Comparative Labor Law Journal*, Vol. 11 1990, pp. 422.

²⁷⁷ Robert Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective (Part II)*, *IJCLIR* Vol. 20/1 2004, p. 132.

²⁷⁸ Roger Blanpain, *European Labour Law*, 7th revised edition, Kluwer Law Int. 2000, p. 26.

²⁷⁹ Roger Blanpain, *European Labour Law*, 10th revised edition, Kluwer Law Int. 2006, p. 281.

to a 'hard core' of rules governing (only) the employment relationship (*la relation de travail*) as a European goal.²⁸⁰

Bercusson has written (1996) that 'like it or not, a dynamic is at work whereby a framework of collective labour law at EU level is being formulated. EU legal interventions in areas of social policy and labour law lead inevitably to EU rules being established regarding collective labour relations – the "spill-over" effect.'²⁸¹ Bercusson sees the source of the dynamic finally in the 'international European economy that dictates an EU-level legal framework'.²⁸² Thus the economy ultimately creates or generates labour law. The legal basis of that economy is naturally the market freedoms and competition rules that have the endless capacity to challenge the national and international labour law structures. The present author shares Bercusson's view, while stressing that it is of the pre-Amsterdam and pre-Albany era, and that the Community has already lived 15 years under the combined shadow of Article 2(6) of the Maastricht Social Policy Agreement and Article 137(5) EC without issuing EU legislative instruments on collective labour law unless on information and consultation. It is on the other hand necessary to note that something has genuinely happened in this field since 1996 since, in addition to *Albany*, the EU Charter has been adopted and has become a point of reference and source of EU law for the Court as well (while the EU Constitution has been abandoned but the Reform Treaty will make the EU Charter binding except in Poland and the UK; see section 3.4, *infra*). Another recent line of development is the growing number of various arrangements including contractual, in multinational companies, partially within the European Works Councils (which I do not explore further).²⁸³ Besides, the time-span regarding creation of transnational collective labour law certainly requires work spanning some decades.²⁸⁴ Furthermore, the spill-over effects in today's perspective seem to stem essentially from the case-law that I explore below.

²⁸⁰ Romain Schintgen, *La longue gestation du droit du travail communautaire: De Rome à Amsterdam*, in Rodríguez Iglesias et al. (eds.), *Mélanges en hommage à Fernand Schockweiler*, Nomos 1999, p. 576.

²⁸¹ Brian Bercusson, *European Labour Law*, Butterworths 1996, p. 521. Bercusson indeed sees the roots of this European framework in the simple fact that national collective labour laws have not been developed with *transnational* industrial relations or collective bargaining in mind. He equally notes the necessity to respect national *equilibria*.

²⁸² *Ibid.*, p. 522.

²⁸³ The Commission has ordered a first report on transnational collective bargaining that explores the prospects in European sectoral social dialogue and multinational companies. See E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining; Past, Present and Future*, European Commission 2006; the report is available via http://ec.europa.eu/employment_social/labour Law/docs/transnational_agreements_ales_study_en.pdf. The report proposes a European directive on this. However, UNICE has made it clear that it does not see any new legal framework as useful (p. 7). As to European sectoral social dialogue, the report indicates that 225 joint texts have been adopted so far, also reflecting growing relevance of negotiations at that level (p. 15).

²⁸⁴ The lengthy process of preparing and adopting the European Works Council system in the form of Directive 94/45 is a graphic example. After the first debates started in 1960s, it still took 14 years from the proposal of the social Commissioner Vredeling in 1980 to adopt the Directive, beside not covering the UK until 1997. The Social Action Programme of 1990, gaining from the momentum of the social dimension related to the completion of the Single Market, re-launched the debate.

There is still one relevant approach, that which appears in an essay by Anne C.L. Davies, entitled ‘Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?’²⁸⁵ Her answer is definitely affirmative, although she does not finally say on which Treaty article her proposed directive on collective labour rights should be based. In any case, she considers Articles 94 and 308 EC as possible candidates while finding that the ECJ might not be sympathetic to their use for this purpose.²⁸⁶ She foresees that the EU should be granted the competence to set minimum standards of freedom of association, collective bargaining, and industrial action to be observed by the member states.²⁸⁷ She also notes that the major advantage of a Community measure (a directive in practice) would be the enforcement mechanism via an infringement procedure. A directive would also employ state liability, although it might be difficult to realise. She further notes some crucial points in such a directive: closed shops, secondary industrial action and strikes in essential services, making it difficult to achieve. Subsidiarity would be one hurdle. Furthermore, she admits that her goal looks remote at present but reminds her readers of the ability of European circumstances to change.²⁸⁸

²⁸⁵ Published in Alston (ed.), *Labour Rights as Human Rights*, Oxford University Press 2005, pp. 176-213 (Davies).

²⁸⁶ The EU Charter, as it has been a recognised point of reference and source of interpretation of law since *Parliament v Council*, will obviously also have an impact on the problem of EU competence on collective labour rights. This is likely even if Article 51(2) stipulates that the Charter does not establish any new power or task for the Community or the Union, or modify the powers and tasks as defined by the Treaties. As a background I recall that it is also contested that Articles 94 and 308 EC could be used so as to circumvent the interpretation regarding Article 137(5) EC (so also AG Mengozzi in *Laval*, paragraph 57 of the opinion of 23.5.2007; see the quotation at footnote 289, *infra*) that excludes a directive on pay, the right of association, the right to strike and the right to impose a lock-out on the basis of Article 137 EC (see, e.g., the position of Syrpis in footnote 16, *supra*). At least Bernard Ryan has referred to the possibility that a more benign reading of Article 94 could take place in consequence of Articles 12, 27 and 28 of the Charter, thus alleviating the prohibition to circumvent a more specific legal basis stipulation, like Article 137(5), in the Treaty; see Bernard Ryan, *The Charter and Collective Labour Rights*, in Hervey and Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart Publishing 2003, pp. 85-6. Lord Wedderburn of Charlton asserted in 1992 that an EC instrument (directive) on freedom of association would be possible under 94 (ex 100) EC; Lord Wedderburn, *Freedom of Association and Community Protection: A Comparative Enquiry into Trade Union Rights of the European Community and into the Need for Intervention at the Community Level*, May 1992, paragraph 35.1; Luxembourg, European Commission 1992. Judge Romain Schintgen, *La longue gestation du droit du travail communautaire: De Rome à Amsterdam*, in Rogríguez Iglesias et al. (eds.), *Mélanges en hommage à Fernand Schockweiler*, Nomos 1999, p. 571, has left it open whether a directive may cover Article 137(5) issues with Article 308 EC as the legal basis. However, Lenaerts and Van Nuffel, (ed. Bray), *Constitutional Law of the European Union* (2nd ed. 2005), p. 94, have noted how ‘Art. 308 may not be used’ to cover ‘excluded policy areas’ or instruments. This would normally leave potential only for a regulation on Article 137(5) matters using Article 308 as the legal basis.

²⁸⁷ Davies., footnote 285, *supra*, p. 206-7.

²⁸⁸ *Ibid.*, p. 213. Davies asserts inter alia that the present protection in the EU of collective labour rights as human rights would be ‘of no assistance where a member state’s own domestic law fails to uphold those rights’ (pp. 206-7). I must disagree. In case C-260/89 *ERT*

For a labour lawyer, Davies' approach is naturally sympathetic. The author has previously given support in the same spirit to the position that an EU directive on collective labour rights would be possible under Article 94 EC or Article 308 EC. In any case, it would be possible under unanimity and having 'representation and collective defence of the interests of workers and employers' in Article 137(2)(f) EC as the legal basis for collective bargaining, thus leaving freedom of association and the right to strike subject to national and international law. However, it is noteworthy that the ECJ could also adopt the position of AG Mengozzi in *Laval*, where he has asserted that '[i]f the effectiveness of Article 137(5) EC is to be upheld, the Community institutions could not of course resort to other legal bases in the Treaty in order to adopt measures designed to approximate the laws of the Member States in this field.'²⁸⁹ I still see Davies' approach as supportable, having in mind the possibility that, taking the EU Charter rights into account, the ECJ would adhere to a more benign interpretation of Article 94 (as referred to by Ryan in footnote 286, *supra*) or 308 EC. It is arguable that this would not be a case of a new competence, which is denied by Article 51(2) of the Charter, but interpreting existing EU competences where it is justified to take the Charter (binding in future) into account as well. Realization of the binding Charter is a natural issue. It would be appropriate to let the ECJ decide on this competence question, an aspect that de facto implies first a unanimously adopted EU measure, challenged then by somebody directly concerned (Article 230 EC).

Thus Davies' approach seems akin to Delors' idea of 'some harmonisation' of social legislation and is a direct application of Bercusson's idea of a necessary and inevitable European framework for collective labour relations. Transplanting that idea into the internal market as enlarged in 2004 (and again to 'EU 27' in 2007) seems more justified than ever in principle, while even 'some harmonisation' and creation of a 'European social area' by means of legislation is) behind unanimity in the Council and will also be so under the Reform Treaty, especially as to collective labour law (or 'provisions related to the rights and interests of employed persons'), whatever the legal basis. Indeed, from the legal point of view, the exclusion of even a European framework enactment can be based on a combined reading of Articles 140, 137(5) and 137(2)(a) EC, depending on will. This author does not share this, given the formal inclusion of the harmonisation target in Article 136 EC and minimum directives to this end under Article 137(2) EC. Such an enactment is therefore rather unlikely in the foreseeable future.

The unlikelihood of written EU collective labour law together with the obvious diversity of labour law regimes among the 27 Member States (emphasized by the reluctance to comply with the ILO and Council of Europe standards by some Member States) leads to the conclusion that it is more realistic to live with a reasonably well-established *ordre communautaire social* as a doctrinal maxim with the protection of fundamental rights as its essential constitutive element. This does not go against the Community setting minimum standards for collective labour rights by legislation;

[1991] I-2925, paragraph 42, the Court held that national rules invoked under Articles 46 and 55 EC must be appraised in the light of human rights (in that case freedom of expression). Furthermore, in *Schmidberger*, paragraphs 73 to 75, for instance, the Court held that the Member States must respect human rights in all situations that fall under the scope of Community law.

²⁸⁹ Paragraph 57 of the Opinion of 23.5.2007.

quite the contrary. Such a directive would be the *ipso jure* crystallisation of *ordre communautaire social*. The essential advantage of a directive would be a monitoring and enforcement mechanism by the Commission, and infringement procedures whenever needed. Finally, irrespective of Davies' idea, the author's view is that a European framework for collective labour rights will emerge in any case as a combination of case-law (or has to some degree already emerged in *Albany*), the binding EU Charter and the effect of the international agreements. On the other hand, the prospect of stipulating collective labour rights via a European framework agreement between the social partners looks at present a highly challenging future issue.

In any case, the challenge in creating EU's collective labour law is not as great as may be presumed on the basis of the warnings by Kahn-Freund, but is now characterized by the emergence of 'EU 27'. Indeed, he wrote in a different era, with virtually no European labour law *acquis* at that time, except on the free movement of workers. Equally, his warnings cannot lead to ignoring the value of comparative labour law in developing European collective labour law and certainly will not be relevant after the judgments in *Laval* and *Viking* and the binding EU Charter of Fundamental Rights. Besides, nobody now endorses the idea of a bold transplantation of a particular national labour law model as a European one.²⁹⁰

In the meantime it seems necessary to consider the present substitute for written law, i.e., the effect of case-law on fundamental rights with its spill-over effect.

3.3 The Effect of *Laval* and *ITF and FSU v Viking* Once Again

In the *Laval* and *Viking* cases, we see the clash between the right to collective action and a market freedom, in these cases the free provision of services, as well as, allegedly, freedom of establishment in *Viking*.²⁹¹ Both cases have a final driving force

²⁹⁰ Barnard's reliance today on Kahn-Freund's warnings looks a rather British approach while the substantive issue is of shaping and creating of a European order in labour law. Besides, even the *Laval* and *Viking* cases alone show that the 'Cinderella approach' (which is not Barnard's own approach) is outdated.

²⁹¹ On these cases, see especially chapter IV of the second publication (section 4.10.5 on *Viking*). The author has found it more appropriate to assess also *Viking* under free provision of services; see footnote 322 of the second publication on the 'rivalling' or overlapping internal market freedoms. In *Viking* the employer has maintained that the envisaged industrial action would also contradict (and even primarily) freedom of establishment (Article 43 EC). However, if a measure relates to two market freedoms at the same time, the Court, in principle defines which one is predominant on an *in casu* assessment, and deals with the case only on that basis. See footnote 322 of the second publication; equally in the recent judgment in case C-452/04 *Fidium Finanz*, judgment of 3.10.2006, nyr, paragraph 34. In that judgment the Court also confirmed that Article 50 EC includes only a definition of services (in relation to free movement of goods, capital and persons) but it does not imply an order of priority between the market freedoms (paragraph 32). Only exceptionally does the ECJ examine a case in light of two market freedoms simultaneously; see case C-390/99 *Canal Satélite Digital SL* [2002] ECR I-607, paragraphs 31 to 33 on telecommunication services; the ECJ found that it was difficult to determine generally whether it is free movement of goods or freedom to provide services which should take priority in the field of telecommunications

in the huge cost gap between the ‘old’ and ‘new’ Member States. Both cases may have far-reaching consequences for the development of EU collective labour law. Nevertheless, the fixed academic time schedule obliges the author to finalise this study and prevents the opportunity to discuss the judgments in these cases.

However, these cases show how the old, rigid concept that matters covered by Article 137(5) EC fall under the exclusive competence of the EU Member States definitely belongs to the past — whether we like it or not. The internal market freedoms and competition rules as regulators of the economy finally impose a European basic collective labour rights framework without this reducing the national rights. The international law argument²⁹² brings the ILO right to industrial action into Community law, and it is also based on Article 28 of the EU Charter of Fundamental Rights. Since the basically similar respect by the EU for the ILO, ECHR (Article 11) and ESC (Articles 5 and 6) rules on freedom of association and on the right to collective bargaining²⁹³ is legally viable and defensible, effective protection of all these rights against the market freedoms and competition rules requires the basic legal parameters for such protection to be incorporated or demonstrated in the EU’s legal order itself. This is what the Court has already initially done in *Albany* and is what the binding effect of the ILO rights to industrial action and freedom of association should do, as also suggested by the other fundamental rights instruments.²⁹⁴ Judgments in *Laval* and *Viking* will arguably lay the necessary foundations for the protection of the right to collective action in EU law (thus, not just within these cases), which will have repercussions for the protection of collective labour rights in general. Finally, the reference questions in *Viking* also seek an answer to the status of the right to

(paragraph 32). See also that in *Laval* the Swedish trade unions have urged in their submission dealing with the company Laval un Partneri as established in Sweden whereas its sister company Baltic Bygg was established there and the latter had no workers of its own but the former posted them from Latvia. If the ECJ, contrary to what I have supposed, treated the issue as a clash between the freedom of establishment and right to collective action in *Viking*, the same reasoning would apply *mutatis mutandis*.

²⁹² See section 2.5, *supra*, at footnotes 201-213, and sections 4.5 to 4.7 in the second publication.

²⁹³ As to protection of freedom of association and the right to collective bargaining in the ESC, see especially footnote 99 in the third publication. Article 5 is the essential source for the protection of the right to collective bargaining within the European Social Charter.

²⁹⁴ The incorporation of the right to industrial action into the EU’s legal order also necessitates a remark on the role of the national and Community Courts. The ECJ naturally cannot replace the national labour courts and tribunals in deciding over perhaps myriad of cases confronting collective action with market freedoms (or competition rules). In the second publication I presumed that the ECJ would decide anything having essential significance in EU law in *Laval* (and in *Viking*, I might add). The lessons from *Bostock* (Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16) and *ERT v DEP* (Case C-260/89 *ERT v DEP* [1991] ECR I-2925, paragraph 42) indicate that the ECJ must provide in a preliminary ruling all the criteria of interpretation needed by the national court to determine whether national rules are compatible with the fundamental rights whose observance the Court ensures. In weighing community rules, i.e., the market freedoms, with fundamental rights the solution, endorsing the uniform application of Community law, might in practice mean to set up the criteria for the assessment of proportionality (normally protection of workers or the social policy objectives of the Community). One finds criteria for the acceptability of restrictions on the right to strike in the ILO practice: narrowly construed restrictions may exist regarding civil servants, essential services and the police and armed forces.

transnational collective action (unless it remains under freedom of association) that for strong and in some sense inherent reasons merits protection by EU law; see sections 2.5 and 2.6, *supra*. Its profound importance for EU labour law as a whole cannot be denied.

In the meantime, it is appropriate to deal with the opinions of the Advocates General. While the ECJ will hand down the judgments in *Laval* and *Viking* on 11 December 2007, it is useful to discuss the main lines of the opinions of Advocates General Mengozzi and Maduro of 23 May 2007 (and relating only to proper wages in *Laval*). Both find the right to collective action a fundamental right in EU law (paragraph 78 by Mengozzi, paragraph 60 by Maduro).

Mengozzi's analysis follows the line in chapter IV of my second publication in general terms, with a few exceptions. First, he recognizes as a source of EU law European Social Charter (paragraphs 65, 66 and 74) next to the ECHR, but does not say a word about the ILO provisions (Constitution and Conventions 87 and 98). Second, he does not discuss the 'international law argument' as I have done²⁹⁵ but takes the ESC as a 'source of inspiration' in the protection of fundamental rights. AG Mengozzi does not discuss the Albany approach at all but straightforwardly adheres to the Arblade-Schmidberger approach, sticking to proportionality assessment as a criterion of the legality of the action concerned (paragraph 241, with a reference i.a. to *Arblade*). In its practical application, Mengozzi relies on protection of workers as the yardstick of proportionality (paragraphs 249, 251 and 307), and reasons that the trade unions may resort to collective action so as to reach an agreement with the posting employer on the average wages²⁹⁶ applicable to comparable domestic employers (paragraph 268). The outcome in the opinion would leave the Swedish regime (the so-called *lex Britannia* included)²⁹⁷ intact as to proper wages, a view which has already generated criticism.²⁹⁸ Bruun has come up with another type of criticism, thus reminding us that inexact guidance on proportionality assessment (which would be completely new in many Member States) may lead to 'highly divergent assessment' in the Member States and that it may also open floodgates to future cases on the legality of collective actions.²⁹⁹ Blanke has asserted that the proportionality criterion

²⁹⁵ See section 2.5, *supra*, and sections 4.5 to 4.7 in the second publication.

²⁹⁶ I have called average wages 'market wages', see the second last paragraph of section 2.4, *supra*.

²⁹⁷ For *lex Britannia*, see especially section 4.9.4 of the second publication.

²⁹⁸ Norbert Reich, *Gemeinschaftliche Verkehrsfreiheiten versus Nationales Arbeitskamprecht*, EuZW 13/2007, pp. 395-6, has claimed that a proportionality assessment model (*Verhältnismäßigkeitsmodell*) 'used in collective action law' (*Arbeitskampfrecht*) leads to establishing an impossibility of free provision of services in *Laval* via a mix of discriminating and non-transparent collective agreement regulations, which contradicts Article 49 EC and the purpose of the PWD. Reich clearly relies on a German type of proportionality that also includes a general reasonableness test (*Angemessenheitsprüfung*) which is not used in EU law; see the position of von Danwitz in footnote 131 of the second publication. Moreover, Reich regrets how Mengozzi's outcome disregards the protection granted in the home state, the difference in 'cost structure' (*Kostenstruktur*) and deprives the posting employer of their competitive advantage; p. 396. This neo-liberal position the ECJ had already dismissed in *Seco* in 1982; see section 1.2.2 of the second publication, at footnote 14.

²⁹⁹ Niklas Bruun, *The Impact of National Labour and Social Law on the Law of the European Community*; forthcoming, lecture on a colloquium by the German Presidency, Berlin 25 June

contradicts bargaining autonomy.³⁰⁰ The author recalls that the proportionality assessment is also alien to the international instruments (ILO provisions and the ESC) which should indicate caution in its use. Declaring the protection of workers as its yardstick on the basis of earlier case-law³⁰¹ seems a reasonable minimum for legal certainty, beside excluding a German-type proportionality assessment that also covers a general reasonableness test (*Angemessenheitsprüfung*) and consideration of third-party interests.

The opinion of Advocate General Maduro in *Viking* generates more criticism. Its first source is the fact that he mentions the fundamental rights aspect only in terms of the EU Charter, thus passing over the guarantees for the right to collective action in the ILO and Council of Europe instruments (both the ECHR and the ESC) in particular. A diffuse ‘social contract’, for him embodied in the preamble to the Treaty, is his basis for the right to collective action (paragraph 59). Otherwise he distinguishes between an action in pre- and post-reflagging situations.³⁰² In the former, he finds the actions of the FSU and the ITF acceptable (paragraph 70 and the proposed third ruling). In the latter he encounters a slippery slope in building up restrictions for the right to collective action. He finds that in a post-reflagging situation both the national action of the FSU and the cross-border action (FOC policy) of the ITF would be illegal. In the national situation, his ground for the strike ban is analogy with the ‘strawberry case’ *Commission v France*³⁰³ (i.e., that the post-reflagging action entirely negates the rationale of the common market, paragraph 68) which passes over the fact that the FSU does not intend any ‘definitive’ negation of the shipowner’s right to free provision of maritime transport services. AG Maduro here seems to forget his earlier ‘internal market rationale’, according to which strikes are instrumental for a fully functioning market.³⁰⁴

As to the cross-border action, Maduro finds it readily subject to abuse, leading to partitioning of the labour market and being based on an obligation of the member trade unions to follow the organisation’s policy, which justifies his proposed ban with a simple intellectual effort (paragraphs 71 and 71). It is noteworthy that his basic and overall justification of EU restrictions on the right to collective action is the simple fact that there are also restrictions at the national level (paragraph 70). Thus, not only does he pass over the international guarantees of the right to collective action but he even neglects the EU-level delimitation of restrictions on fundamental rights, as

2007: 50 Years of EU - 50 Years of Jurisdiction of the European Court of Justice Concerning Labour and Social Law.

³⁰⁰ Thomas Blanke, Observations on the Opinions of Advocates General Maduro and Mengozzi delivered on 23 May 2007 in the *Viking* and *Laval* cases, Transfer 3/2007 (forthcoming). Blanke also directs this criticism against the opinion of AG Maduro in *Laval*.

³⁰¹ See, e.g., case C-60/03 *Wolff&Müller* [2004] ECR I-9553, paragraphs 43-44, discussed in brief in section 2.4, *supra*, and in more detail in section 2.2.5 (also mentioned in section 3.4, as to proportionality) of the second publication.

³⁰² The legal issue is whether free movement rules ban a strike concerning the reflagging and wages after reflagging a Finnish vessel in future (M/S Rosella) in another Member State (Estonia), planned to be followed by replacement of the predominantly Finnish crew by an Estonian one. The collective action would be realized mainly on the shipowner’s vessels other than Rosella. See further the second publication, section 4.10.5. See also section 2.5, *supra*.

³⁰³ Case C-265/95 *Commission v France* [1997] ECR I-6959.

³⁰⁴ See his comment at footnote 196, *supra*.

manifested in *Schmidberger*, paragraph 80. Restrictions must be based on a pressing need in society, and shall not be disproportionate and impair the substance of the right concerned. Needless to say, restrictions proposed by Maduro on fundamental rights should emanate from a democratic process. Furthermore, freedom of association is guaranteed under the international instruments (as in Article 11 ECHR, and in fact already in Article 20 of the Universal Declaration of Human Rights and in Articles 2, 3 and 5 of the ILO Convention No. 87)³⁰⁵. It is therefore up to the international workers' organisations to draw up their statutes and decide upon their policies whereby restrictions are acceptable only on essential public services (like protection of life and health, and the police and army) and otherwise under exceptional circumstances, as are the ILO criteria. All in all, following the opinion's restrictions on the right to collective action in the judgment would seriously undermine the European trade union organisations' ability to defend the interests of their members both in national and European terms.

3.4 The Reform Treaty

In shaping the future, I move on to the Reform Treaty. The Introduction to this article (p. 3) put the question about its impact on the overall balance between economic and social factors and on the *ordre communautaire social* both as to the relationship between the social rights and market freedoms and competition rules, and in more general terms. Although I have quoted only Bercusson's, Maduro's and Fredman's assessments of the future binding EU Charter of Fundamental Rights, my thesis is that they represent, if not the view of the whole doctrine, at least the bulk of it by asserting that the EU Charter presents the social and labour rights constitutionally on an equal footing with the civil and political as well as economic rights for the first time in the history of the Community.³⁰⁶ The Reform Treaty will set this basic balance in concrete by making the Charter legally binding (I touch on the UK and Poland exceptions below) and raising it to the same legal status as the Treaties. Retrospectively, the difference from the residual status of social rights in the original Treaty of Rome is already striking, but the binding Charter would obviously also influence the interpretation of EU legislative and other measures in de Búrca's terms,³⁰⁷ leading to further reconsideration of the relationship between social rights and the market freedoms and competition rules. The former should be seen as rights on their own, not mere restrictions of market freedoms.

³⁰⁵ International trade union organisations are recognised by Article 5 of ILO Convention No. 87. As to its effects, see, e.g., the complaint of the International Confederation of Free Trade Unions (ICFTU) et al. v. Australia, report No. 320, case No. 1963 (Doc. Vol. LXXXIII, 2000, Series B, No. 1), mentioned in footnote 217 and discussed in footnote 218 of the second publication. The international trade union organisations are entitled to independence as national ones.

³⁰⁶ As to Bercusson and Maduro, see section 1.4.4, *supra*, at footnote 101. It is another story whether Maduro's conclusions in *Viking* are in conformity with his general qualification regarding the Charter; see the previous section. As to the position of Fredman, see her comment at footnote 121, *supra*.

³⁰⁷ See section 1.4.4, *supra*, at footnote 120.

In describing the (probable) forthcoming paradigm change in favour of an even more prominent role for fundamental rights in EU law, one may also refer to the perspective of AG Mengozzi in *Gestoras Pro Amnistia*:

177. To give priority to the fundamental right to effective judicial protection and to disapply for that purpose the relevant provisions of the EU Treaty on the powers of the Court of Justice would necessitate recognising that there was also a hierarchy among primary rules and a kind of ‘supra-constitutional’ value in the respect for fundamental rights. I consider that such an approach, while not in itself alien, is not permissible *in the present state of Union law*, not least because the current treaties do not explicitly list the fundamental rights guaranteed by the Union. The Charter cannot, in my opinion, make good the lack of such a list, since it is only a source of inspiration for the Community court and national courts in clarifying the fundamental rights protected by Union law as general principles and has no binding legal force. That limitation would obviously no longer apply if all the Member States ratified the Treaty establishing a Constitution for Europe, Part II of which lists the fundamental rights, among which is expressly enshrined, in Article II-107, the ‘right to an effective remedy and to a fair trial’. (emphasis original)³⁰⁸

He repeated the same idea of the present state of Community law in *Laval*:

84. To reject in all cases the applicability of the freedoms of movement provided for in the Treaty with the aim of guaranteeing the protection of fundamental rights would in reality amount to upholding a hierarchy between the rules or principles of primary law which, if not necessarily entirely inapposite, is not allowed as Community law stands at present.

In *Laval* Mengozzi naturally referred to the cited statement in *Gestoras Pro Amnistia*. Replacing the Constitutional Treaty by the ratified Reform Treaty, one concludes that Mengozzi takes into account a possible paradigmatic change in favour of fundamental rights in their relation to internal market rules, the former perhaps thus becoming superior to the latter. It suffices to note that following Mengozzi’s perspective would obviously also mean in cases like *Laval* (and logically those like *Viking*) reasoning strictly on the line dominated by the relatively tiny possibility of establishing restrictions on the fundamental right to collective action for internal market reasons, instead of any general balancing between these competing requirements of simply equal rank. It will remain to be seen whether this might influence actual cases. Thus, the question about the Reform Treaty affecting for instance the traditional judge-created justification pattern for justifications of restrictions in free provision of services remains. Time will tell the result. In more general terms, the Reform Treaty with a binding Charter (by the amended Article 6(1) EU) can be said to be the final

³⁰⁸ Case C-354/04P *Gestoras Pro Amnistia*, opinion of 26.10.2006, nyr. It is noteworthy that AG Stix-Hackl came up with the idea of affording fundamental and human rights a ‘certain precedence’ over ‘general’ primary legislation in case C-36/02 *Omega* [2004] ECR I-9609; however, she continued by noting how the (fundamental) market freedoms can also ‘perfectly well’ be materially categorised as fundamental rights — at least in certain respects like in guaranteeing the general principle of equality whereby a conflict between the fundamental freedom and a fundamental and human right can also represent a conflict between fundamental rights; see paragraph 50 of the opinion of 18 March 2004.

step in endorsing a more comprehensive *ordre communautaire social* thinking, with the Charter rights as its natural basis. This will amongst other things essentially alleviate the underdeveloped nature of the EU's collective labour law.

Making the EU Charter legally binding via the Reform Treaty will also demonstrate the interpretation quarrels about the content of the Charter. The direct and indirect effect of the Charter as well as a very likely state liability for infringements would be such natural quarrel areas.³⁰⁹ However, the core labour rights (in Articles 12, 27 and 28) are formulated in the Charter as real rights instead of mere principles.

The broad-looking constraint in Article 51(1) about the Charter binding the Member States only when implementing Union law could for good reason be transformed in line with the general fundamental rights scheme of the Charter to continue the present protection of fundamental rights within the scope of Community law which is settled case-law, as *Schmidberger* noted.³¹⁰ The restrictive wording of Article 51(1) of the Charter is based on the *Karlsson* judgment given by a small chamber, according to the Explanations of the Praesidium of the Convention.³¹¹ This concerned implementation of an EU milk regulation that certainly does not authorize any general conclusion reducing the field of application of the human rights requirements from that affirmed by the Court in plenum, either on the basis of Article 6(2) EU as in *Schmidberger*, or with a direct reference to the ECHR as in *ERT*. That Article 51(1) of the Charter does not reduce the protection of fundamental rights to Member States' implementation measures is the position also taken by the EU Network of Independent Experts on Fundamental Rights.³¹² The author believes, in fact, that the wording of Article 51(1) resulted from a political bow towards the few Member States keen to reduce the effect of the Charter, for which the Praesidium's Explanations give nothing but a blatant excuse. It is also to be underlined that Article 53 of the Charter recognises more extensive protection than that provided for by the Charter. Article I-9(3) of the Constitutional Treaty would also have allowed an interpretation against the letter of Article 51(1) of the Charter. Hence, a legitimate expectation is that the ECJ will cover

³⁰⁹ See Bercusson, Clauwaert and Schömann, footnote 101, *supra*, p. 48.

³¹⁰ See the core of the relevant case-law: case 12/86 *Demirel* [1987] ECR 3719, paragraph 28; case C-260/89 *ERT v. DEP* [1991] ECR I-2925, paragraph 42; case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 73 to 75; and case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 56.

³¹¹ Case C-292/97 *Karlsson* [2000] ECR I-2737, paragraph 37. See the Europe Convention Praesidium's explanations under Article 51(1) of the Charter in CONV 828/1/03, 19.7.2003 (thus, after *Schmidberger*), available via <http://register.consilium.eu.int/pdf/en/03/cv00/cv00828-re01en03.pdf>.

³¹² See EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union (with Olivier De Schutter as the writer here), European Commission June 2006, p. 392. The Commentary calls this use of case-law in the Convention Praesidium's Explanations unskilled ('*malhabile*'). The author agrees. The Commentary is available: http://ec.europa.eu/justice_home/doc_centre/rights/charter/docs/network_commentary_final%20_180706.pdf. Also Lenaerts and Van Nuffel (ed. Bray), Constitutional Law of the European Union (2nd ed. 2005), pp. 723-5, repeat the 'scope of Community law' doctrine without questions, relying on case-law since case 12/86 *Demirel* [1987] ECR 3719, paragraph 28 ('...although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law...'; emphasis added).

all the measures within the scope of Community law with the fundamental rights obligation in future as well; this means covering labour rights under the broad concept of ‘economic activities’ in Article 2 EC.³¹³

The variable references in the Charter to national law and practice deserve further elaboration. To start with, Tonia Novitz has noted about Article 28 of the EU Charter that the reference to ‘national laws and practices’ means that ‘the scope of any right to strike is to be defined entirely at the national level, which would ensure that no EU standard is set as regards scrutiny of compliance with the right’, as the explanatory text indicates (see footnote 228 of the second publication). While this statement leaves the reference to Community law in Article 28 out of consideration, the reference to national law and practices naturally involves a debate on the real effect of Article 28 as a Community standard. However, as a ‘safety net’ she, too (like myself), refers to Article 53 of the Charter that recognises that the Charter is not intended to limit or adversely affect human rights and fundamental freedoms in other international instruments.³¹⁴ Similarly, the Charter does not legitimate any infringements of the international legal obligations of the Member States. Clearly deviating from the position of Novitz, Bercusson has put a whole list of arguments against any diluting effect of the references to national law and practice. He argues *inter alia* that, next to the international law argument stemming from Article 53, (i) national laws and practices limiting the Charter rights would undermine the supremacy of EU law, to which the ECJ is unlikely to agree; (ii) the added value of the Charter can only be realised if national standards are treated as minimum standards beyond which the Charter rights may go; (iii) the references to national law and practice, especially in the Title on Solidarity, should be interpreted narrowly so as not to contradict the ethos of the Charter, i.e., solidarity, by assuring a common floor of fundamental rights throughout the EU.³¹⁵ A third approach is taken by the EU Network of Independent Experts:

In a number of cases, it is up to the legislature or the other national authorities to define the conditions for exercising a particular right, for example by regulating the exercise of the right to strike, setting up a social security system or entrusting certain tasks of general interest to service providers. However, what the national authorities have to do is to regulate the right in question, in other words, make it possible to exercise this right by defining its rules: a total

³¹³ As to economic activities in Article 2 EC delimiting the scope of Community law, see case C-509/04P *Meca-Medina* [2006] ECR I-4601, paragraph 22, where the ECJ continued this doctrine. However, unlike the CFI (cited in footnote 205 of the second publication), the ECJ explicitly held that the qualification of a doping rule as “purely sporting” was not sufficient to remove the athlete or the sports association adopting the rule in question from the scope of Articles 81 and 82 EC (paragraph 27). In this respect, the exclusion of the social partners from Article 81 EC in paragraph 59 of *Albany* is to be regarded as a ‘self-executing’ *lex specialis*, meaning *inter alia* that the internal decision-making of trade unions is not subject to Article 81 EC.

³¹⁴ See Tonia Novitz, *The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO*, in Alston (ed.), *Labour Rights as Human Rights*, Oxford University Press 2005, p. 228.

³¹⁵ Brian Bercusson, *The EU Charter of Fundamental Rights and national laws and practices*, in Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos 2006, pp. 423-433, a summary of arguments appears on p. 433.

suppression of the right in question or the imposition of excessively restrictive conditions for exercising it, resulting in a repudiation of its ‘essential substance’, would not be in keeping with the requirements of the Charter of Fundamental Rights of the Union.³¹⁶

This position seems to be essentially closer to Bercusson than Novitz. The international law argument and those related to the supremacy and uniformity of EU law are also normally strong ones in the ECJ, which will in any case have the last word about the whole impact of the references to national law and practice in the Charter.

The Reform Treaty is significantly marked by the ‘UK and Poland exception’ as to fundamental rights, i.e., by the Protocol to be attached to the EU Treaty which will confirm that the Charter ‘does not extend the ability’ of the European or national courts to find that Polish or UK laws, regulations or administrative provisions, practices or action are ‘inconsistent with the [Charter] rights, freedoms and principles’ (Article 1(1) of the Protocol).³¹⁷ Next to this, Article 1(2) of the Protocol underlines the non-justiciability of rights in the Solidarity Title of the Charter in Poland and the UK, thus *inter alia* the right to collective bargaining and action in Article 28 of the Charter, unless there are corresponding justiciable rights in national law. Hence, the Charter will not become binding in Poland and the UK which is a result of a politico-ideological choice by their present governments. Given the overall political climate, especially in the UK, this sidetrack may this time become considerably longer than the five post-Maastricht sidetrack years regarding the 1992 Maastricht Social Policy Agreement. In any case, the ‘UK and Poland exception’ shows a certain disregard for the universality of the human or fundamental rights, in particular as regards labour rights. In other words, at the 2004 Intergovernmental Conference, the UK was unable to prevent binding Charter rights, but at the Brussels June Summit of 2007 it was in principle successful as to its own territory, being later followed by Poland. To put it the other way round, the explicit negation of justiciable rights by the Protocol establishes the interpretation that outside Poland and the UK the Charter rights may be justiciable.

The wording of the Protocol (‘does not extend the ability’) is subject to differing interpretations in the sense of whether it implies a certain existing ability which is however not extended (broadened), or whether it means to negate any competence in the given sense (in establishing inconsistencies with the Charter rights). Given the

³¹⁶ EU Network of Independent Experts on Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union in 2004, European Commission January 2005, p. 14; the report is available at

http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2004_en.pdf.

³¹⁷ See Protocol No. 7 to be annexed to the EU and EC Treaties, doc. CIG 2/1/07 REV 1, 5.10.2007; <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00002re01en.pdf>. In the Polish case the denial of the Charter’s binding nature is complemented by Poland’s declaration (doc. CIG 3/1/07 REV I, 5.10.2007) that, “having regard to the tradition of social movement of ‘Solidarity’ and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.” Paradoxically, Title IV is also headed ‘Solidarity’. It still remains to be seen whether this declaration may have any interpretative effect.

political framework concerned, especially in UK, the latter is probably meant, which obviously means to negate even the Charter's interpretive value, against settled case-law as well, in addition to negating its fully binding effect. This would be the most contradictory because the corpus text of the new EU Treaty (Article 6(1)) will state that the Charter shall have the same legal value as the Treaties. Indeed, the Protocol disregards both the uniformity of EU law and its primacy in relation to contradictory national law in Poland and the UK. For all these reasons, the Protocol should be subject to the narrowest possible interpretation. One consequence of such an interpretation is that the Protocol shall not affect the already existing interpretive status of the Charter. Another consequence is that the Protocol must not affect Poland's or the UK's existing international obligations within labour law, i.e., the rights overlapping with the Charter rights like those in the ILO Constitution (notably freedom of association and the effective recognition of the right to collective bargaining), in the ECHR and in the European Social Charter (e.g., the right to collective bargaining and action in Article 6(4) ESC where the UK has no reservation but Poland does).

In practice, I mean a situation in which a UK trade union or their association would invoke the ILO right to collective action against the internal market freedoms (of establishment and services) before the ECJ as a shield of its transnational secondary action. This is in fact one of the two alternative ways to shape the situation of the International Transport Workers' Federation in the *Viking* case.³¹⁸ In line with the narrow interpretation, the Protocol arguably cannot affect the ECJ's ability to endorse the ILO right as valid in the EU as well (the international law argument), although this would run counter to and override the UK law on secondary action. In this sense the Protocol seems a Pyrrhic victory for the UK and Polish governments. Naturally, the ECJ has the final word in this sense.

As a Reform Treaty conclusion, hence highlighting the binding Charter rights of the legal value of the Treaties, one may in general terms state that collective EU labour law is developing from the level of the recognition of 'general principles of labour law' (see the *General Union of Personnel of European Organizations*, *Amalgamated European Public Service Union* cases, both 1974, and *Maurissen II* 1990)³¹⁹ into a more articulated and mature stage of *ordre communautaire social*. This development broadly taken follows the Union's general development from the European Economic Community to a political and social Union, the landmarks of which are the Single European Act (Article 118b EEC), the 1989 Community Charter of Fundamental Social Rights of Workers, the Treaties of Maastricht and Amsterdam (insertion of the fundamental rights references in Article 136 EC) and, as to some more detailed features discussed in this study, the Transfer of Undertakings (Acquired Rights) Directive, *Seco*, the Posted Workers Directive, *Albany* (also as to the developments under Article 86(2) EC), and the EU Charter of Fundamental Rights. The pending *Laval* and *Viking* cases are of same constitutional rank. Still, it is undeniable that the UK and Poland exception in the Reform Treaty may cast a shadow over these generally positive developments for a considerable number of years.

³¹⁸ See sections 2.5 and 2.6, *supra*.

³¹⁹ See the discussion in section 1.3, *supra*.

In any case, the present situation highlights the role of the Court as a rule-maker on collective labour rights in the Community while it is dependent on the cases brought before it. The Reform Treaty shifts the emphasis towards the European legislator while the European Courts' role as the referee in the application of the binding Charter will remain important, indeed the more important the less secondary legislation emerges, especially on collective labour rights. While the EU Charter is by definition in rather general language, it in any case includes a European consolidation of social rights on an equal footing with the economic constitution of the EU but will in the foreseeable future probably not be followed by further detailed secondary legislation on collective labour rights (in addition to information and consultation rights) given the unanimity requirement. The legal-ideological, paradigmatic argument gets more weight in this sense, highlighting the *ordre communautaire social* doctrine as well.

Some perspectives might be open, especially in the application of the EU Charter of Fundamental Rights, via the open method of coordination (OMC),³²⁰ although the Member States and the Commission have had this option in the field of labour law, freedom of association and collective bargaining under Article 140 EC (in terms of encouraging cooperation and facilitating coordination) since the beginning without any striking results. Obviously the degree of political commitment by the Member States will finally decide whether the OMC may produce significant results. There is also resistance in principle against dealing with fundamental rights via the OMC,³²¹ as well as overall criticism vis-à-vis the OMC, stemming from the high value of the rule of law and rule-based governance in the EU.³²² These remarks suffice for the purposes of this study to underline the need to conduct the possible OMC as not undermining the protection of fundamental rights.

³²⁰ For a proactive approach on the open method of coordination see, e.g., Olivier De Schutter, *The Implementation of Fundamental Rights Through the Open Method of Coordination*, in De Schutter and Deakin (eds.), *Social Rights and Market Forces: is the open coordination of employment and social policies the future of Europe?*, Bruylant 2005, pp. 279-343. De Schutter sees the search for equilibrium in the conciliation of economic freedoms and fundamental rights as a part of this method, a balancing in which neither gets precedence; pp. 338-340. When writing the areas of activities of the EU's Fundamental Rights Agency, established by Regulation 168/2007, are not defined.

³²¹ See for opposing the OMC (which is not subject to any judicial control) regarding fundamental rights, particularly enforceable ones, Vassilis Hatzopoulos, *Why the Open Method of Coordination Is Bad For You: A Letter to the EU*, *ELJ* Vol. 13, No. 3, May 2007, p. 341; he refers as a ground to the need to avoid varying OMC outcomes depending on political winds, or conflicts like that in *Mangold* (see section 1.4.4, at footnotes 102-112, *supra*), thus between a fundamental right (to non-discrimination on the basis of age) and a (neo-liberal) unlimited resort to fixed-term working contracts above a given age.

³²² See, e.g., Christian Joerges, *What is Left of the European Economic Constitution*, *EUI Working Papers* 2004/13, pp. 25-32.

3.5. Concluding Remarks

This study project is headed ‘From Internal Market Regulation to European Labour Law’ and thus is a development narrative. Hence, the already considerable body of individual EU labour law, together with the information and consultation rights, justifies speaking of European labour law as a specific area of European law. Moreover, the European Social Dialogue and the recognised status of the right to collective bargaining (*Albany*) together with the other labour rights included in the EU Charter of Fundamental Rights show the emergence of European collective labour law. *Laval* and *Viking* will obviously develop it further. In addition, the European Union is bound by the international obligations of its constituent Member States, which further enriches European labour law. All in all, since the Union is a unique entity as a legal Community, its labour law is unique as well. A distinctive legal concept, the *ordre communautaire social*, looks useful in describing an elementary part of such a unique feature, i.e., most obviously its relationship with the market freedoms and competition rules, both fundamental to the Union, and more broadly in shaping the legal-ideological substratum of the Community’s labour law order.

Conclusively, the tentative reasoning on *ordre communautaire social* shows that it is worthwhile both at the level of interpretations of, legal reasoning on, and understanding of European labour law while it also includes normative elements like the binding effect of fundamental labour rights that come essentially from international law. It is thus, however, more than mere rights enacted or recognised by the legislator and courts and partially fills the gap created by the lack of collective labour law enactments (unless on social dialogue or information and consultation) by the EU. Thus, it is a proposal for a labour law paradigm at the Union level, especially collective labour law.

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